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13
No. 10068

United States

Circuit Court of Appeals

For the Ninth Circuit.

Vol
2297

GEORGE M. STOUT, State Liquor Administrator
of the State of California, and LUTHER M.
SAY, Chief Liquor Control Officer of District
D of the State Board of Equalization of the
State of California,

Appellants,

vs.

BERT M. GREEN, Trustee of the Estate of
George Hugo Malter, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Southern District of California,
Northern Division

FILED

APR 3 - 1942

No. 10068

United States
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles, California.

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For Appellee United States of America:

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600 U. S. Post Office and Court House
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Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Northern Division.

No. 5186 In Bankruptcy

In the Matter of

GEORGE HUGO MALTER,

Bankrupt.

CERTIFICATE AND REPORT OF REFEREE
ON PETITION OF GEORGE M. STOUT,
AS STATE LIQUOR ADMINISTRATOR,
AND LUTHER M. SAY, AS CHIEF
LIQUOR CONTROL OFFICER OF DISTRICT D OF THE STATE BOARD OF
EQUALIZATION, TO REVIEW ORDER OF
REFEREE.

To the Honorable Judges of the United States District Court, for the Southern District of California:

I, Samuel F. Hollins, one of the referees in bankruptcy of this court and the referee in bankruptcy in charge of this proceeding, respectfully certify and report:

That on the 18th day of April, 1940, there was filed on behalf of the trustee herein the following verified

PETITION FOR A RESTRAINING ORDER
AND ORDER TO SHOW CAUSE

directed to George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief

Liquor Control Officer of the State of California, for [2] District D thereof, as follows:

“The petition of Bert M. Green, Trustee in Bankruptcy of George Hugo Malter, respectfully shows:

“That on or about the 12th day of August, 1939, the above named bankrupt filed a debtor’s petition under Section 322 of the Bankruptcy Act and proceedings thereunder were referred to Samuel F. Hollins, one of the Referees in Bankruptcy of the above entitled court;

“That thereafter, and on or about the 18th day of November, 1939, the above named debtor was duly adjudicated a bankrupt and that thereafter and on the 22nd day of November, 1939, petitioner was duly appointed the trustee of the bankrupt’s estate and effects; that he thereupon qualified as such and your petitioner ever since has been and still is the duly qualified and acting trustee of said estate.

“That petitioner, as such Trustee, has taken possession of the assets of said bankrupt, which consist of approximately five (5) acres of land, and equipment designed for the manufacture of brandy from grapes. That among said equipment there is a dismantled still designed for the distillation of brandy from fruit juices. That petitioner has not operated said still or carried on any business whatsoever; that he has preserved said assets, including said still, as an asset of said estate and has kept said property

under his custody at all times. That petitioner has never had any money in his hands whatsoever.

“That prior to the filing of the petition in this proceeding various creditors have secured, through proceedings in the State Courts, liens by judicial process against the property of said bankrupt which were more than four months old at the date of the filing of these proceedings. That said claims aggregate approximately the sum of \$9,201.96.

“That there is a claim filed by the Collector of Internal Revenue of the United States in the amount of \$710.73, [3] which claim sets forth the claim of a statutory lien of the Collector of Internal Revenue against the assets of the bankrupt and alleges that said lien arises out of unpaid alcohol taxes.

“That George M. Stout as Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the California State Board of Equalization, in charge of said District in which said dismantled still is located, although they have filed no claim in these proceedings have demanded that your petitioner apply for and obtain a license from the State of California under the Alcohol Beverage Control Act to possess such still which is an asset of the above entitled bankrupt estate, and to pay therefor the sum of \$10.00 license fee thereunto pertain-

ing. That your petitioner has no funds belonging to said estate and has not operated said still and does not intend to operate said still and said still cannot be operated without expenditure of substantial funds in rebuilding said still.

“That by reason of the failure of the petitioner hereunder to pay said \$10.00 and apply for said license said George M. Stout, as said Liquor Administrator, and said Luther M. Say, as Chief Liquor Control Officer, have threatened to have a felony complaint issued against petitioner for failure to comply with said Alcohol Beverage Control Act, and have interviewed the District Attorney of Fresno County to that end and have threatened and are now threatening to seize said still and commence forfeiture proceedings against said still and to destroy said still.

“That said still is a valuable asset of said estate and that petitioner is diligently attempting to liquidate said estate, clear up the liens and dispose of said assets in accordance with the provisions of the Bankruptcy Law of the United States, and that said threatened action of said State [4] Liquor Administrator and Chief Liquor Control Officer will cause irreparable loss to the estate of the bankrupt and will greatly hamper petitioner in the orderly administration of the estate of said bankrupt.

“Wherefore, your petitioner prays that a

Restraining Order be issued restraining George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer of the State of California, for District D thereof, and their agents and employees from seizing said still of the bankrupt, or taking any steps whatsoever pertaining to such seizure, and from interfering with Petitioner's possession and control of said still, and the orderly administration of the bankrupt's estate; and that an order to show cause be issued on this petition ordering said George M. Stout and said Luther M. Say to show cause why said restraining order should not be made permanent.

“BERT M. GREEN
Petitioner”

(Verification omitted for sake of brevity.)

Based on said petition the following

**RESTRAINING ORDER AND ORDER
TO SHOW CAUSE**

was issued on April 18, 1940:

“At Fresno, in said District, on the 18th day of April, 1940.

“Upon reading the verified petition of Bert M. Green, Trustee in Bankruptcy of George Hugo Malter, the above named bankrupt, duly filed herein; upon all the other papers filed and proceedings had herein; and upon motion of

Frank C. Lerrigo, attorney for said trustee, and good cause appearing therefor,

“It Is Ordered that George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the California State Board of Equalization, and each and every person acting for [5] and in aid and assistance of the said George M. Stout as California State Liquor Administrator, and Luther M. Say as Chief Liquor Control Officer of District D of the State of California, and their agents and employees, be, and each of them is hereby restrained until the hearing of this order, and until the further order of this Court from seizing that certain still for the distillation of spirituous liquors, now located on the premises, belonging to the estate of George Hugo Malter, a bankrupt, the said premises being described as follows: Real property in the County of Fresno, State of California, described as follows:

The East half of Lot 31 of Easterby Rancho, according to the map thereof recorded June 24, 1880 in Plat Book 2 at page 6, in the office of the County Recorder of said County, and which premises and the said still located thereon are now under the jurisdiction and control of Bert M. Green, as Trustee in Bankruptcy, for George Hugo Malter, bankrupt, and the said George M. Stout and Luther M. Say,

their agents and employees are further restrained from interfering in any way with the possession and control of said still by Bert M. Green, as such Trustee in Bankruptcy, and from interfering in any way with the orderly administration of the estate of said bankrupt until the further order of this Court.

“It Is Further Ordered, that George M. Stout as such State Liquor Administrator, and the said Luther M. Say, as Chief Liquor Control Officer of District D of the State of California, shall appear before this Court at the courtroom located in the Pacific Southwest Building, at Room 710 thereof, on the 11 day of May, 1940, at nine-thirty o’clock A. M. of said day, then and there to show cause if any they have, why the said restraining order shall not continue in full force and effect, and why such other and further order should not be made as may be proper in the premises. [6]

“Dated at Fresno, California, this 18th day of April, 1940.

“SAMUEL F. HOLLINS

“Referee in Bankruptcy of
said Court.”

Thereafter and on May 11, 1940, there was filed on behalf of said respondents George M. Stout and Luther M. Say, the following

MOTION TO DISMISS:

“George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of the State of California for District D thereof, of the State Board of Equalization of the State of California, in response to the Order to Show Cause issued out of the above entitled Court in the above entitled matter and directed to them and each of them, hereby move to dismiss the petition of Bert M. Green, Trustee in Bankruptcy in the above entitled matter, and the Order to Show Cause issued April 18, 1940, by the Honorable Samuel F. Hollins, Referee in Bankruptcy of said Court, upon the following grounds:

I.

“That said petition does not, nor does any part thereof state a cause for relief as against the movants herein, or either of them.

“EARL WARREN,

Attorney General of the State
of California

“By J. ALBERT HUTCHINSON

“Deputy Attorney General

“Attorneys for George M. Stout and
Luther M. Say.”

The respondents filed no answer to the trustee's petition at any time and in their oral and written arguments argued that the motion to dismiss should be dismissed because of lack of jurisdiction of the Referee.

The Trustee's counsel on the 11th day of May, 1940, filed a paper termed "Stipulation", a copy of which is attached to the Petition for Review of Order of Referee attached hereto, which [7] purported to set forth some of the facts. Inasmuch as the respondents filed no answer and the stipulation appeared incomplete and in the opinion of the Referee the Collector of Internal Revenue was a necessary party to a full determination of the matter on the merits, he has taken the position with the respondents' counsel that they were submitting the matter on the motion to dismiss only.

Thereafter, and on May 11, 1940, the matter was argued orally by the respondents, through their attorneys, and the trustee, through his attorney, and thereafter submitted on written briefs, and on October 26, 1940, the Referee made an

**ORDER DENYING THE MOTION
TO DISMISS,**

as follows:

"The Trustee having filed herein on April 18, 1940, his petition for Restraining Order; and on said date an Order to Show Cause and Restraining Order was issued directed to George M. Stout, California State Liquor Administra-

tor, and Luther M. Say, as Chief Liquor Control Officer of California State Board of Equalization, restraining said officers from seizing a certain still for the distillation of spirituous liquors, which still was under the jurisdiction and control of the Trustee, and the said officers having appeared herein on May 11, 1940, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and moved the Court to dismiss the petition of the Trustee and the Order to Show Cause on the grounds 'that said petition does not nor does any part thereof state the cause for relief as against the movants or either of them'; and the matter having been argued in open court and having been submitted on briefs and the Court having considered the same and being fully advised in the premises and being satisfied that the Court has jurisdiction of the subject matter and the still in question, and that the matter should be presented on the merits after giving notice to all interested [8] parties including the United States of America who claims a lien on the still for distilled spirits taxes,

"It is therefore ordered, adjudged and decreed that the Motion to Dismiss be and the same is hereby denied.

"It is further ordered, adjudged and decreed that the Restraining Order heretofore entered in the above entitled matter be and the same

is hereby continued in full force and effect until the matter is presented on the merits and until further order of the Court.

“Dated: October 26, 1940.

“SAMUEL F. HOLLINS

“Referee in Bankruptcy”

Simultaneously with the filing of said order the Referee filed the following

MEMORANDUM OPINION:

“The petition of the Trustee in Bankruptcy for an order to show cause and restraining order sets forth that since the 22nd day of November, 1939, he has been the duly appointed, qualified and acting Trustee of the above named bankrupt; that he took possession of the assets of the bankrupt; that among the assets was a dismantled brandy still; that he has not operated or been authorized to operate the still, or carried on any business whatsoever; that he had, prior to the date of filing of this petition been preserving the assets, including the still; that he has never had any cash at all; that the Collector of Internal Revenue has filed a claim in the sum of \$710.73 wherein a lien was claimed upon the assets because of unpaid alcohol taxes; that George M. Stout, California State Liquor Administrator, and Luther M. Say, a Chief Liquor Control Officer of the California State Board of Equalization, without ap-

pearing in the bankruptcy court and although no claims were filed in the bankruptcy court, did make a demand upon the Trustee to pay a still license fee; the [9] trustee being without funds had not complied with the demands; that the officers had threatened to have a felony complaint issued against the trustee for alleged possession of a dismantled still without a permit in violation of the California Alcohol Beverage Control Act, (Statutes of 1935, Chapter 330 as amended), and had threatened to seize the still; that the still was a valuable asset of the estate and that the Trustee was diligently attempting to liquidate the estate by disposing of the assets in accordance with the Bankruptcy Act, and that the threatened action of the State Officers would cause irreparable loss to the estate and hamper the trustee in the administration of the estate.

“A restraining order and order to show cause was issued on the respondents, returnable before the Bankruptcy Court on May 11, 1940.

“On May 11, 1940, the State Officers appeared and moved to dismiss the restraining order on the ground that,

‘said petition does not nor does any part thereof state a cause for relief as against the movants herein or either of them.’

A motion to dismiss admits all the well pleaded allegations of the petition.

“The question raised is whether a bankruptcy court may under the allegations of the petition restrain State Officers, who file no claim in the bankruptcy court and have not asked the bankruptcy court’s permission to confiscate or commence forfeiture proceedings against a dismantled still which the bankrupt lawfully owned, from seizing such an asset of a bankrupt estate.

“In the case of *Isaacs vs. Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 Sup. Ct. Rep. 270, Mr. Justice Roberts said,

‘Upon adjudication, title to the bankrupt’s [10] property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson v. Howard*, 229 U. S. 254, 259, 260, 33 S. Ct. 854, 57 L. Ed. 1174; *Wells & Co. v. Sharp* (C. C. A.) 208 F. 393; *Galbraith v. Robson-Hilliard Grocery Co.* (C. C. A.) 216 F. 842. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt

estate. It may order a sale of real estate lying outside of the district. *Robertson v. Howard*, *supra*; *In re Wilka* (D. C.) 131 F. 1004. When this jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts. *White v. Schloerb*, 178 U. S. 542, 20 S. Ct. 1007, 44 L. Ed. 1183; *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327; *Dayton v. Stanard*, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190. This is but an application of the well-recognized rule that, when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession, and control of the property.'

“We are dealing with the acknowledged duty and power of courts to protect property in their custody. As Chief Justice Fuller stated in the case of *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 Law Ed. 689, at 695,

‘No rule is better settled that that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned,

and cannot be disturbed without the leave of the court; and, that if any person without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor.'

"In *White vs. Schloerb*, 178 U. S. 542, 44 Law Ed. 1183, Mr. Justice Gray, speaking for the Court, said:

'At the date of this adjudication in bankruptcy by the district court of the United States, the goods were in the store of the bankrupts and in their actual possession, and were claimed by them as their property. On the same date that court referred the case to a referee in [11] bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a state court.'

"A referee in Bankruptcy, after reference, can do everything that a judge can do, except, adjudicate voluntary petitions (except in absence of the judge); commit for contempt; hear jury trial when demanded; extradite a bankrupt; enjoin a court; transfer cases and designate newspapers.

Collier on Bankruptcy, 14 Ed. Vol. 2, p. 517.

“It is admitted that a claim filed in this matter establishes that the United States claims \$710.73 unpaid distilled spirits taxes. The revenue law makes that a lien against the still. Whether the respondent officers could seize the still and prosecute forfeiture proceedings against it and eliminate the claim of the government we are not prepared to say. Section 3251 of Revised Statutes provides,

‘Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid. (R. S. 3251; Acts July 20, 1868, 1, 4. 15 Stat. 125, 126; June 6, 1872, c. 315, 12, 17 Stat. 238.)’

“The fact that they claim such a lien on the still that the bankrupt owned and lawfully possessed and the title to which is now vested in the trustee by operation of law (Section 70 of the Bankruptcy Act) supplies the reason for

the rule requiring the respondents to come into the bankruptcy court by whatever form of [12] petition they deem advisable so that their rights, the rights of the United States government and all other parties may be adjudicated. If respondents are dissatisfied with any decision, economical and speedy methods of review and appeal are afforded by the act of Congress.

“If the law was as respondents contend, efficient administration of the bankruptcy law would be impossible.

“Respondents have argued, and we think correctly so, that the state law in question is a police regulation. They have argued that it is the duty of the state officers to inspect all stills including the still in question. The bankruptcy records are public records, the statutes make it a penal offense for a referee to refuse to permit inspection during reasonable hours. The trustee in the instant case is a man of unquestioned integrity; he is bonded; incidentally, he happens to be a deputy district attorney of the County of Fresno, State of California, and there is no question but what he will cooperate with the respondent officers and permit inspection of the res in question at all times. It will be presumed that he has done his duty and kept the still safely stored.

“Respondents question the jurisdiction of the bankruptcy court to issue the restraining order and yet it is admitted the still has been under

the jurisdiction of the bankruptcy court since the date of the filing of the petition. Thus the bankruptcy court has had the actual possession of the res at all times and under the cases of *Harrison vs. Chamberlain*, 271 U. S. 191, and *Taubell-Scott-Kitzmiller Co. vs. Fox*, 264 U. S. 426; 68 Law Ed. 770; 44 S. Ct. 396; 2 Am. B. R. (NS) 912, the bankruptcy court has summary jurisdiction over the res.

“If other authority were necessary, the case of *In re [13] Hornstein*, 122 Fed. 266, at page 271, is one of many that could be cited. In that case the court said:

‘The court has no hesitation in holding that express power is given by the Act of Congress to Courts of Bankruptcy to enjoin all persons within its jurisdiction, whether litigant in a state court or elsewhere, from doing any act which will interfere with or prevent the due administration of the Bankruptcy Act.’

“Respondents have asked no affirmative relief. They filed no process in the bankruptcy court wherein the rights of respondents, the United States Government and all parties might be brought before the court and considered. They only move to dismiss. We think that it follows that the restraining order should be continued in force until the further order of the court, reserving to the respondents the right

at any time to file in the bankruptcy court whatever petition or other process they deem advisable, but until they do, it is clear that the bankruptcy court has exclusive jurisdiction of the res. The motion to dismiss is denied.

“Exception allowed to the respondents. Counsel for trustee to prepare appropriate orders.”

Thereafter and on May 7, 1941, George M. Stout, et al, filed an

ANSWER AND PETITION FOR DELIVERY OF POSSESSION OF THE STILL.

Said Answer was verified on December 12, 1940, and said Answer and Petition reads as follows:

“Now come George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization of said state, and answer and petition of Bert M. Green, trustee in the above-entitled action, dated April 18, 1940, for restraining order; and for answer thereto admit, deny and aver as follows: [14]

I.

“Answering respondents have no knowledge or information sufficient to enable them to form a belief concerning the truth or falsity of the matters set forth and alleged in said petition on pages 1 and 2 thereof, to and including line 18 of said last-numbered page, and that por-

tion of said petition appearing on page 3 commencing with line 10 through line 19 on said last-numbered page, and placing their answer upon the ground that they have no such knowledge, information or belief, deny conjunctively and disjunctively, generally and specifically, each and every, all and singular, the allegations contained in said portions of said petition, and each of said allegations.

II.

“Answering respondents admit the allegations contained in said petition commencing with line 19 on page 2 through line 10 on page 3, save and except that statement contained on page 2 thereof commencing on line 28, and reading as follows:

‘That your petitioner has no funds belonging to said estate and has not operated said still and does not intend to operate said still and said still cannot be operated without expenditure of substantial funds in rebuilding said still.’——

concerning the truth or falsity of which quoted statement answering respondents have no knowledge or information sufficient to form a belief, and placing their answer upon that ground, answering respondents deny conjunctively and disjunctively, generally and specifically, each and every, all and singular, the alle-

gations and statements contained in said quoted statement of said petition.

* * *

“Further answering said petition, and as and for a separate answer thereto, and as and for a petition and claim on behalf of the People of the State of California, answering [15] respondents admit, deny and aver as follows:

I.

“That the still described in said petition of Bert M. Green and dated April 18, 1940, reference to which is hereby made, and which is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length, at all times therein and herein mentioned has been and now is an alcoholic beverage still; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California; that said Bert M. Green has not applied for nor received, and does not hold, any license or permit of the said State Board of Equalization or of any other officer of the State of California permitting him to possess said still; that said still has been at all of said times located within the State of California and is now within said state.

II.

“That by reason of the facts alleged in said petition and herein, said still has been forfeited

to the State of California by virtue of and pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes 1935, Chapter 330, as amended); that it is the duty of answering respondents to seize and take possession of stills and other property forfeited to the State of California by virtue of said Act, and to hold the same for the purpose of such forfeitures, and specifically that it is the duty of answering respondents to seize and take possession of said still pursuant to said Act, and to thereafter cause the commencement of an action in the appropriate courts of the State of California for the confirmation of said forfeiture by the appropriate officers of the State of California.

“Wherefore, answering respondents pray that the [16] restraining order and injunction herein sought by said Bert M. Green, trustee in the above-entitled proceeding, be denied; that the temporary restraining order of the referee made and executed herein on the 18th day of April, 1940, restraining answering respondents from seizing said still and interfering with the possession and control of said still by said Bert M. Green until further order of said court, and that certain order dated October 26, 1940, by said referee, continuing said restraining order of April 18, 1940 in full force and effect until further order of the court, be recalled, annulled and set aside; that Bert M. Green,

trustee, take nothing by reason of his said petition, or otherwise; that answering respondents herein be given possession of said still as required by law, for the purposes of said statutes of the State of California; and that the court make and enter its order releasing to answering respondents said still, and directing said trustee to deliver possession of the same to them for the purposes of said statutes, as aforesaid, with leave to answering respondents and other appropriate officers of the State of California to proceed pursuant to the provisions of the statutes of said state.

“EARL WARREN

Attorney General of the
State of California

“J. ALBERT HUTCHINSON

Deputy Attorney General

“Attorneys for George M.
Stout and Luther M. Say.”

(Verification omitted for sake of brevity)

Thereafter and on May 7, 1941, the Trustee filed his

ANSWER TO THE PETITION OF STOUT, et al,
which said answer reads as follows:

“Now comes Bert M. Green, Trustee of the above named bankrupt and answers the petition of George M. Stout and [17] Luther M. Say for release and delivery of possession of

a certain distilled spirits still and for an answer thereto, admits, denies and alleges as follows, to wit:

I.

“Bert M. Green, as said Trustee denies generally and specifically, conjunctively and disjunctively each and every, all and singular the allegations contained in said petition, not in Trustee’s petition for restraining order and injunction, and in that certain stipulation by the parties hereto, dated May 11th, 1940, expressly admitted to be true.

“As and for a separate, distinct and affirmative defense to the said claim and petition of Luther M. Say and George M. Stout, Bert M. Green, as trustee in bankruptcy alleges as follows, towit:

I.

“That the said Bert M. Green, as said trustee failed and refused to procure a still license as of May the 11th, 1940, the date of the above referred to stipulation under an honest mistake of law, and since that time has duly applied for a still license from the State of California authorizing him to possess the said still, and has tendered the legal fee required for the said still license; that the said Bert M. Green is a fit and proper person to receive a still license and the premises upon which said still is located are proper premises for the location of a

still; that the State Board of Equalization has not acted on the application of the said Bert M. Green, said trustee, for a still license; that the said Bert M. Green has complied with all the laws of the State of California, concerning the application for a still license, and by reason of the said application and by reason of the right of said Bert M. Green to have a still license, the said still is legally possessed [18] by the said Bert M. Green.

“Wherefore, the said Bert M. Green prays that the injunction and restraining order issued by the above-entitled court, restraining and enjoining George M. Stout and Luther M. Say from doing any act to interfere with the possession of said still license may continue in full force and effect, and that the petition and claim of George M. Stout and Luther M. Say for the possession and seizure and forfeiture of said still be dismissed.

“BERT M. GREEN

Petitioner.

“FRANK C. LERRIGO

“Attorney for Petitioner”

(Verification omitted for sake of brevity)

That thereafter and on May 24, 1941, a further hearing was held upon the petition for the restraining order, the order to show cause and the answer and petition of Stout, et al, at which hearing oral testimony was offered covering the good character

of the trustee and the trustee testified concerning his failure to apply for a license when the demand was first made upon him, because he had no funds whatsoever and also because his attorney advised him that in his opinion the law did not require him to do so but suggested as a practical matter that the trustee borrow the \$10.00 or put it up himself. The Trustee in this matter of practical administration chose to rely on his counsel's view of the law rather than upon his counsel's suggestion as to practical administration. That on or about the 11th day of December, 1940, the trustee filed an application with the State Board of Equalization on a form furnished by it and filled it in in the appropriate spaces and transmitted the same with a cashier's check for \$10.00 to the State Board of Equalization [19] applying for a license upon said still and that no action either granting or denying his application had been taken by the State Board of Equalization.

It was then agreed by counsel for the trustee and counsel for Stout, et al, that certain stipulations would be written up and submitted in evidence within a short time. That thereafter and on June 10, 1941, a

STIPULATION OF FACTS

was filed, reading as follows:

“It is hereby stipulated and agreed, by and between George M. Stout, California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, of District ‘D’

of the California State Board of Equalization, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and Bert M. Green, as Trustee in Bankruptcy for George Hugo Malter, Bankrupt, by Frank C. Lerrigo, his attorney, that the following related facts are true and correct and shall be considered as evidence in the hearing of the petition of Bert M. Green, Trustee in Bankruptcy, for George Hugo Malter, Bankrupt, for a Restraining Order restraining George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, from seizing a certain still in possession of Bert M. Green, as said Trustee in Bankruptcy for George Hugo Malter, said facts being as follows, to wit:

That on or about August 12th, 1939, George Hugo Malter was the owner and possessor of a certain still for the distillation of spirituous liquors; that at said time said George Hugo Malter was not the owner and holder of a license from the State of California under the *pvosions* (provisions) of the alcoholic beverage control act, Statutes of 1935, Chapter 330, as amended, permitting him to own, possess and operate said still, his said license having expired on June 30th, 1939, and [20] at the time of the threatened seizure referred to in the petition herein.

“That on the 12th day of August, 1939, said

George Hugo Malter filed a debtor's petition in the above entitled court under the provisions of Section 322 of the Bankruptcy Act of the United States; that thereafter on November 18th, 1939, said George Hugo Malter was adjudicated a bankrupt by the United States District Court, Southern District of California; that on or about November 22nd, 1939, Bert M. Green was duly appointed Trustee in Bankruptcy of the estate of George Hugo Malter, Bankrupt, and thereafter qualified as such Trustee and ever since such time has been and now is the duly appointed, qualified and acting Trustee in bankruptcy for the Estate of George Hugo Malter, Bankrupt;

“That as such Trustee, said Bert M. Green has come into the possession of said still, owned by the said bankrupt at the time of the filing of his petition in bankruptcy; that said still is dismantled and has not been operated by said Trustee, nor does said Trustee contemplate the operation of said still; that Bert M. Green, as such Trustee refused to apply for a license to possess or operate said still until on or about December 11th, 1940, at which time he did apply for said still license, and said application has not been granted or denied by the State Board of Equalization of the State of California; that the said Trustee owns and possesses said still only in his capacity as Trustee in Bankruptcy of the Estate of George Hugo Malter, Bankrupt;

“That by reason of the refusal of Bert M. Green, as such Trustee to apply for and receive the said license from the State of California under the provisions of the said Alcohol Beverage Control Act, George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control [21] Officer for District ‘D’ of the State of California Board of Equalization have threatened and are now threatening to seize said still under the forfeiture provisions of the said Alcohol Beverage Control Act of the State of California, and to remove the said still from the possession and control of Bert M. Green, as said Trustee in Bankruptcy, and the Bankruptcy Court of the United States.

“Dated at Fresno, California, this 7th day of June, 1941.

“EARL WARREN,

Attorney General

By J. ALBERT HUTCHINSON
Attorney for George M. Stout,
California State Liquor Administrator, and Luther M. Say,
Chief Liquor Control Officer, of
District ‘D’ of the California
State Board of Equalization.

“FRANK C. LERRIGO

Attorney for Bert M. Green, Trustee in Bankruptcy.”

Certain letters exchanged between the trustee's attorney and attorney for Stout, et al, were by stipulation admitted in evidence after the hearing.

After counsel representing the interested parties had submitted the matter the following

ORDER ON THE TRUSTEE'S PETITION FOR
RESTRAINING ORDER, AND STOUT'S
PETITION FOR LEAVE TO COMMENCE
FORFEITURE PROCEEDINGS

was filed in said bankruptcy proceeding.

“At Fresno, California, in said District, on the 12th day of June, 1941.

“Upon the petition of Bert M. Green, Trustee for restraining order and order to show cause filed herein on April 14, 1940, and the answer of George M. Stout and Luther M. Say, and petition of said Stout, et al, for release and delivery of possession of a still, filed herein on May 7, 1941, upon the bankruptcy petition, the order of adjudication, and upon all other [22] papers and proceedings had herein, and upon due consideration of the testimony of the witnesses and other evidence, and after hearing Frank C. Lerrigo, attorney for the Trustee, and J. Albert Hutchinson, deputy attorney general, in opposition to the trustee's petition and in support of the petition of George M. Stout, et al, for the release and delivery of possession of a still, the Referee hereby finds that on or about August 12, 1939, the above named bank-

rupt was the owner and possessor of a dismantled still for the distillation of liquor; that on August 12, 1939, the above named bankrupt filed a debtor's petition under the provisions of Section 322 of the Bankruptcy Act; that thereafter and on November 18, 1939, Malter was adjudicated a bankrupt and on November 22, 1939, Green was appointed trustee and he thereafter qualified as such trustee and has continued to act as such trustee and as such came into the possession of said dismantled still; that said trustee has neither operated or has he contemplated the operation of said still;

“That on or about the 22nd day of January, 1940, Deputy Attorney General J. Albert Hutchinson requested of the trustee's counsel that the trustee apply for a license with the State Board of Equalization; that at said time and for a long time thereafter the trustee was absolutely without any funds whatsoever;

“That all of the allegations of the trustee's petition for restraining order filed herein on April 18, 1940, are true; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California;

“That thereafter, said trustee having converted some of the assets into money, on or about the 11th day of December, 1940, made written application on forms provided by the State Board of Equalization of the State of

California for a license on said [23] still and accompanied said application with a certified check in the proper amount; that said trustee is a person of good reputation; that although said State Board of Equalization has had said application and said certified check for more than five months they have neither granted or denied said application.

“Now, upon motion of Frank C. Lerrigo, Esq., attorney for said Trustee, it is

“Ordered that the prayer of said trustee’s petition be and the same is hereby granted, and said temporary restraining order is hereby continued in force and effect until action is taken by the State Board of Equalization upon the application of the trustee for a license, and the petition of respondents Stout, et al, is hereby denied until action is taken by the State Board of Equalization upon the application of the trustee herein for a license, and until the further order of the Court. Jurisdiction of the Referee is hereby retained to entertain pending or future petitions in the premises, after action by the State Board of Equalization upon the trustee’s application for a license herein.

“SAMUEL F. HOLLINS

Referee in Bankruptcy.”

Thereafter and on June 21, 1941, there was filed on behalf of Stout, et al, a Petition for Review of the Order of the Referee, original of which, together

with exhibits, is attached hereto and by express reference made a part hereof.

Questions Presented

There is but one question presented on this petition for review, viz.,

Has this court jurisdiction to restrain the respondents from interfering with the assets of the bankrupt estate, and confiscating and forfeiting assets outside of the [24] bankruptcy court, when the United States claims a distilled spirits tax lien on the still, which accrued prior to the State's alleged right of forfeiture, in excess of the appraised value thereof, and when the trustee's application for a license has neither been granted nor denied?

Discussion by and Opinion of Referee

If the district court had the power to restrain respondents under the facts, then the referee has the same power as the district judge.

See *Colliers on Bankruptcy*, 14 Ed. 517; 14 *Journal Nat. Assn. of Referees*, Page 17.

Section 3251, Revised Statutes, provides "The tax shall be a first lien * * * on these stills * * * from the time said spirits are in existence * * * until the tax is paid." It would seem that the lien of the Federal Government is prior in time and prior in right to the State's rights in the still. Stout's petition for permission to commence forfeiture proceedings, nor the Trustee's petition, nor any other proc-

ess has yet brought before the Court the Collector of Internal Revenue of the proper district as the appropriate representative of the United States to give him as such representative of the United States his day in Court and permit him to be heard on the question as to whether the State has a right to commence forfeiture proceedings against property upon which the Government's lien is apparently first.

Summary of the Evidence

The evidence showed that Green, the trustee, was appointed Trustee in the above matter on November 22, 1939; that the proceedings were commenced on or about the 12th day of August, 1939, and that the Trustee, upon his qualification came into possession [25] of a dismantled still.

The still has not been operated by the trustee and the trustee never contemplated the operation of the still; he refused to apply for a license to possess or operate the still until about December 11, 1940, at which time he filed an application on the usual application form and submitted it with a certified check for \$10.00 to the State Board of Equalization.

That the trustee was informed by his attorney that state officers had demanded that he apply for a license and had talked about filing a felony complaint against the trustee some time after he had qualified as trustee but he did not apply for a license because he had no money on hand belonging

to the estate and also because his attorney advised him that in his opinion, since he was not operating the still, it was not necessary for him to secure a license. That thereafter, and on or about the 11th day of December, 1940, his attorney advised him that while he did not think it was necessary to apply for a license but that in the attorney's opinion it would save time and trouble and avoid unpleasantness if he would apply for a license; that the trustee then had money in his possession and he did apply for the license, but although several months had passed the State Board of Equalization had never acted on his application at all.

The bankrupt's license expired on June 30, 1939, but the trustee did not know the license had not been renewed. The trustee stated he did not desire to co-mingle funds of his own with the funds of the bankrupt estate and that he would have resigned as trustee rather than co-mingle funds.

The evidence also showed that Trustee Green held a similar position as trustee in the matter of the Kearney Winery and that a still was contained among the assets of that estate and that he did not apply for a license because his attorney [26] advised him it was not necessary since he was not operating the still and did not intend to operate it.

That the collector of internal revenue for the First District of California claims a distilled spirits tax lien upon said pieces of metal or dismantled still in an amount which exceeds the value of said

still; that the lien of said collector of internal revenue attached before the bankrupt's license from the State Board of Equalization expired.

Attorney for Stout, et al, brought out that in addition to having suggested the question as to whether a license was required could be tested by having a felony complaint warrant issued against the trustee, he had suggested other methods, such as a forfeiture proceeding.

That Trustee Green is a man of good reputation was testified to by the president of the Fresno County Bar Association and that he is the chief deputy district attorney of Fresno County.

Further Discussion and Opinion of Referee

The evidence showed, and the Referee found, that the Trustee, now a chief deputy district attorney of Fresno County, California, was a person of good character and yet the State Board of Equalization has never acted upon his application for a license. If his license is granted then the whole question would be settled. The prayer of Stout's petition for leave to commence forfeiture proceedings should be denied until the State Board of Equalization acts upon the trustee's application for a license.

Should the State Board of Equalization deny the application of Trustee Green for a permit or license to possess the still, then and in that event all the interested and necessary parties, and particularly the Collector of Internal [27] Revenue, whose lien

is apparently prior in time and prior in right, should be brought before the Court on appropriate pleadings and process and the rights of all parties, including the United States of America, should be adjudicated.

This case appears very similar to the case of *Pearson vs. Higgins*, decided by the Ninth Circuit and reported in 34 Fed. 2d. at page 27, where the respondents, without waiting for a trial on the merits before the Referee attempted to review the Referee's determination that the Bankruptcy Court had jurisdiction. Judge Dietrich held that the matter attempted to be reviewed was not an appealable order where there was no trial on the merits, holding that the Appellate Courts do not sit to anticipate possible grievances or try out controversies piece-meal. Judge Dietrich said:

“That issue—the only substantive one in the case—neither the referee nor the court below has determined. The referee decided only that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. Being discontent with this ruling, made upon a preliminary objection, appellants, without awaiting the event of a trial on the merits, petitioned the district judge for a review, and the order from which this appeal is prosecuted went no further than to deny the petition. Manifestly, therefore, the appeal is premature. In an ordinary case at law or in equity, an order overruling an objection to the

court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. Appellants could have no real grievance unless and until the referee entered a turnover order. After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain. Appellate courts do not sit to anticipate possible grievances or to try out controversies in piece-meal."

The Referee's order of June 12, 1941, after continuing the restraining order in effect, denied the petition of Stout, et al, until decision by the State Board of Equalization upon the Trustee's application for a license, and expressly retained jurisdiction to entertain pending or future petitions in the premises after action by the State Board of Equalization upon [28] the Trustee's application for a license.

14 Collier on Bankruptcy, at page 1487, the following is said:

"All final orders of the referee are, of course, reviewable. But although interlocutory orders are also reviewable, the review of interlocutory orders which relate to mere preliminary steps in a proceeding, and which may be passed upon effectively at the final stage of the proceeding, is not encouraged. Accordingly the district judges are reluctant to consider upon prelimi-

nary review such matters as an interlocutory order directing the bankrupt to file an answer after he has answered evasively, an interlocutory order refusing to grant a continuance, or an interlocutory order overruling objections to a petition before the referee.”

14 Collier on Bankruptcy, at page 1488, the following is said:

“According to 39c, such a petition must ‘set forth the order complained of and the alleged errors in respect thereto’; and the judge may either decline to pass upon points not specifically designated or he may simply dismiss the petition. The Act does not contemplate a general review of the bankruptcy proceedings, or of rulings not directly affecting an order. Thus, where the complaint is that a particular finding is not supported by the evidence, the assignment of error should state HOW the evidence fails to support the referee’s finding.”

It is respectfully submitted that under the statutes and the authorities, the Bankruptcy Court not only has jurisdiction but a duty to protect the assets in its custody from being taken away by physical force or proceedings in other courts until the State Board of Equalization has acted upon the Trustee’s application for a license and until the Collector of Internal Revenue has a representative of the United States Government which apparently

has a first and prior lien upon the dismantled still brought before the Court by appropriate process and given the right to establish the priority, if any, of its lien.

It is further respectfully submitted that a Bankruptcy Court should not permit assets to be taken out of its custody [29] until the Collector of Internal Revenue has had his day in Court and an opportunity to prove that the government's lien is a first lien upon the dismantled still in question.

The order appealed from is not a final order.

Pearson vs. Higgins, 34 Federal 2d., 27.

Papers Handed Up Herewith

I hand up herewith the following papers:

1. Respondents' Petition for Review of Order of Referee, and exhibits attached thereto.

Dated: July 21, 1941.

Respectfully submitted,

SAMUEL F. HOLLINS

Referee in Bankruptcy

[Endorsed]: Filed Jul. 24, 1941. [30]

(Clerk's Note: The following exhibit is a part of the former Petition for Review certified by the Referee in his former Certificate on Review filed herein Nov. 29, 1940.)

EXHIBIT B

[Title of District Court and Cause.]

MOTION TO DISMISS

George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of the State of California for District D thereof, of the State Board of Equalization of the State of California, in response to the Order to Show Cause issued out of the above entitled Court in the above entitled matter and directed to them and each of them, hereby move to dismiss the petition of Bert M. Green, Trustee in Bankruptcy in the above entitled matter, and the Order to Show Cause issued April 18, 1940, by the Honorable Samuel F. Hollins, Referee in Bankruptcy of said Court, upon the following grounds:

I.

That said petition does not, nor does any part thereof state a cause for relief against the movants herein, or either of them.

EARL WARREN,

Attorney General of the State
of California,

By J. ALBERT HUTCHINSON,

Deputy Attorney General,
Attorneys for George M. Stout
and Luther M. Say.

(Filed with Referee May 11, 1940.)

[Endorsed]: Filed Nov. 29, 1940. R. S. Zimmerman, Clerk. [31]

(Clerk's Note: The following exhibit is a part of the former Petition for Review certified by the Referee in his former Certificate on Review filed herein Nov. 29, 1940.)

EXHIBIT C

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed, by and between George M. Stout, California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, of District "D" of the California State Board of Equalization, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and Bert M. Green, as Trustee in Bankruptcy for George Hugo Malter, Bankrupt, by Frank C. Lerrigo, his attorney, that the following related facts are true and correct and shall be considered as evidence in the hearing of the petition of Bert M. Green, Trustee in Bankruptcy, for George Hugo Malter, Bankrupt, for a Restraining Order restraining George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, from seizing a certain still in possession of Bert M. Green, as said Trustee in Bankruptcy for George Hugo Malter, said facts being as follows, to wit:

That on or about August 12th, 1939, George Hugo Malter was the owner and possessor of a certain

still for the distillation of spirituous liquors; that at said time said George Hugo Malter was the owner and holder of a license [32] from the State of California under the provisions of the alcoholic beverage control act, Statutes of 1935, Chapter 330, as amended, permitting him to own, possess and operate said still; that said license and its privilege had expired at the time of the threatened seizure referred *to the* petition herein.

That on the 12th day of August, 1939, said George Hugo Malter filed a debtor's petition in the above entitled court under the provisions of Section 322 of the Bankruptcy Act of the United States; that thereafter on November 18th, 1939, said George Hugo Malter was adjudicated a bankrupt by the United States District Court, Southern District of California; that on or about November 22nd, 1939, Bert M. Green was duly appointed Trustee in Bankruptcy of the estate of George Hugo Malter, Bankrupt, and thereafter qualified as such Trustee and ever since such time has been and is now the duly appointed, qualified and acting trustee in bankruptcy for the Estate of George Hugo Malter, Bankrupt;

That as such Trustee, said Bert M. Green has come into the possession of said still, owned by the said bankrupt at the time of the filing of his petition in bankruptcy; that said still is dismantled and has not been operated by said Trustee, nor does said trustee contemplate the operation of said still; that said Trustee has not applied for or received a

license from the State of California permitting him to possess or operate said still under the provisions of the California Alcohol Beverage Control Act, Statutes of 1935, Chapter 330, as amended; that the said Trustee owns and possesses said still only in his capacity as Trustee in Bankruptcy of the Estate of George Hugo Malter, Bankrupt;

That by reason of the refusal of Bert M. Green, as such Trustee to apply for and receive the said license from the State of California under the provisions of the said Alcohol Beverage Control Act, George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer for District "D" of the State of California Board of Equalization [33] have threatened and are now threatening to seize said still under the forfeiture provisions of the said Alcohol Beverage Control Act of the State of California, and to remove the said still from the possession and control of Bert M. Green, as said trustee in bankruptcy, and the bankruptcy court of the United States.

Dated at Fresno, California, this 11th day of May, 1940.

EARL WARREN,

Attorney General of the State
of California

By J. ALBERT HUTCHINSON,
Deputy

Attorney for George M. Stout, California
State Liquor Administrator, and Luther
M. Say, Chief Liquor Control Officer, of

District "D" of the California State
Board of Equalization.

FRANK C. LERRIGO,

Attorney for Bert M. Green,
Trustee in Bankruptcy.

(Filed with Referee May 11, 1940)

[Endorsed]: Filed Nov. 29, 1940. R. S. Zimmerman,
Clerk. [34]

(Clerk's Note: The following exhibit is a part
of the former Petition for Review certified by the
Referee in his former Certificate on Review filed
herein Nov. 29, 1940.)

EXHIBIT D

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS AND ORDER CONTINUING RESTRAIN- ING ORDER

The Trustee having filed herein on April 18, 1940,
his petition for Restraining Order; and on said
date an Order to Show Cause and Restraining Or-
der was issued directed to George M. Stout, Cali-
fornia State Liquor Administrator and Luther M.
Say, as Chief Liquor Control Officer of California
State Board of Equalization, restraining said offi-
cers from seizing a certain still for the distillation
of spirituous liquors, which still was under the
jurisdiction and control of the Trustee, and the
said officers having appeared herein on May 11, 1940

by Earl Warren, Attorney General of the State of California and J. Albert Hutchinson, Deputy Attorney General and moved the Court to dismiss the petition of the Trustee and the Order to Show Cause on the grounds “that said petition does not nor does any part thereof state the cause for relief as against the movements or either of them”; and the matter having been argued in open court and having been submitted on briefs and the Court having considered the same and being fully advised in the premises and being satisfied that the Court has jurisdiction of the subject matter and the still in question, and that the matter should be presented [35] on the merits after giving notice to all interested parties including the United States of America who claims a lien on the still for distilled spirits taxes,

It is therefore ordered, adjudged and decreed that the Motion to Dismiss be and the same is hereby denied.

It is further ordered, adjudged and decreed that the Restraining Order heretofore entered in the above entitled matter be and the same is hereby continued in full force and effect until the matter is presented on the merits and until further order of the Court.

Dated: October 26, 1940.

SAMUEL F. HOLLINS

Referee in Bankruptcy

[Endorsed]: Filed Nov. 29, 1940. R. S. Zimmerman, Clerk. [36]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER
OF REFEREE

To the Honorable, the District Court of the United
States:

Your petitioners, George M. Stout, as State
Liquor Administrator of the State of California,
and Luther M. Say, as Chief Liquor Control Officer
of District D of the State Board of Equalization,
respectfully represent:

I.

That Richard E. Collins, George R. Reilly, Fred
E. Stewart, William G. Bonelli are the duly elected,
qualified and acting members of the State Board of
Equalization of the State of California, and that
Honorable Harry B. Riley, State Controller, is
ex officio member of said Board; that your peti-
tioner George M. Stout is the duly appointed,
qualified [37] and acting State Liquor Administra-
tor of the State of California, and that your peti-
tioner Luther M. Say is the Chief Liquor Control
Officer of District D of said State Board of Equal-
ization.

II.

That the said State Board of Equalization is
given the duty of enforcing the Alcoholic Beverage
Control Act of the State of California (Statutes
1935, p. 1123, as amended) and the provisions of
the Constitution of the State of California relating

to the alcoholic beverage industry and its incidents (Article XX, section 22), and your petitioners herein are the employees and officers of said Board whose duty it is to enforce the requirements of licensing, to make and carry out seizures, and investigate and inform upon violations of the penal provisions of said Act in the State of California and the portion thereof embraced within the territorial jurisdiction of this Court.

III.

That heretofore and on or about the 18th day of April, 1940, Bert M. Green, trustee in bankruptcy of George Hugo Malter, the bankrupt above named, procured upon a petition for restraining order and order to show cause signed and verified by him in said proceedings, a restraining order and order to show cause directed to your petitioners and returnable before the Honorable Samuel F. Hollins, on the 11th day of May, 1940; that a copy of said order is attached hereto as Exhibit A, and is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length.

[38]

IV.

That said Bert M. Green alleged in said petition:

That the bankrupt above named filed a debtor's petition pursuant to section 322 of the Bankruptcy Act on the 12th day of August, 1939, in the above-entitled Court; that thereafter and on or about the 18th day of November, 1939, said bankrupt was

duly adjudicated a bankrupt; that he was the trustee of the estate of the above-named bankrupt, appointed by said referee as such trustee on the 22nd day of November, 1939; that he had taken possession of the assets of said bankrupt, which included equipment designed for the manufacture of brandy from grapes; that a part of said equipment was "a dismantled still designed for the distillation of brandy"; that the still had not been operated in any manner since it came into the possession of said trustee; that there was no money in said estate, and the properties of the estate were subject to the liens created through judicial proceedings in the State courts, which liens were in existence for more than four (4) months at the date of the filing of the debtor and bankruptcy proceedings; that said claims aggregate approximately \$9,201.96, and include a claim filed by the Collector of Internal Revenue of the United States in the amount of \$710.73, which claim purports to constitute a statutory lien against the assets of the bankrupt for amounts due as unpaid alcoholic beverage taxes due the Collector of Internal Revenue of the United States; that your petitioners, although they had filed no claim in the proceedings, had demanded that said trustee apply for and obtain a license from the State of California as required by the Alcoholic Beverage Control Act of said state in order to possess and continue to possess said [39] alcoholic beverage still, and to pay therefor the sum of \$10.00, specified

as the fee for such still license; that your petitioners, in default of such license and the payment of such license fee, also threatened to commence criminal proceedings against said trustee for failure to comply with said Act with respect to possessing said still, and likewise threatened to seize said still and to commence forfeiture proceedings against the same, as permitted by said Act; that said still is a valuable asset of said estate; and that the threatened action of your petitioners would cause irreparable injury to the estate and hamper the trustee in the orderly administration of the estate of said bankrupt.

V.

That thereafter and on or about the 11th day of May, 1940, to which date the return on the said order to show cause had been duly continued, your petitioners appeared in response to said order to show cause and filed in said proceedings pending before said referee of this Court their certain motion to dismiss and notice of motion to dismiss; that said motion to dismiss was heard on said last-mentioned day and submitted to said referee upon memorandum to be filed in said proceedings.

VI.

That at said hearing said trustee and your petitioners submitted to said referee as a part of the record in said proceedings their certain written stipulation dated the 11th day of May, 1940; that said stipulation was indetical in form and substance

with that certain stipulation dated the 24th day of May, 1940, hereinafter more particularly referred to, and which is filed herein and attached hereto as Exhibit B [40] and made a part hereof for all purposes with the same force and effect as though herein set forth at length, save and except the statement in the latter stipulation, in the second paragraph thereof, that said bankrupt did not hold nor possess a license permitting him to own or possess the still in question on or after the 1st day of July, 1939, and the statement in the fourth paragraph thereof that said trustee had applied to the appropriate officers of the State of California on or about the 11th day of December, 1940, for a license permitting him to possess said still, which latter statements were not included in said stipulation dated the 11th day of May, 1940.

VII.

That thereafter and on or about the 20th day of October, 1940, said memoranda were filed by the parties to said proceeding on said order to show cause, and the matter was submitted to said referee.

VIII.

That thereafter and on or about the 26th day of October, 1940, said referee determined said motion to dismiss by denying the same, saving and allowing to your petitioners herein an exception; and that said order was in writing.

IX.

That said motion to dismiss was denied upon the grounds stated in said memoranda and order, which are that the bankruptcy court had exclusive jurisdiction of the res, namely, said brandy still, and the United States of America possessed therein and thereon a statutory lien for the amount of \$710.73 as unpaid distilled spirits taxes, for which reasons the officers of the State were without jurisdiction to act in [41] any manner with respect to said still.

X.

That in said order said referee ordered and directed that the restraining order theretofore made, as aforesaid, be continued in force until further order of the Court, reserving to your petitioners the right to file in bankruptcy such petition or other process which they deemed advisable.

XI.

That thereafter your petitioners petitioned this Honorable Court for a review of said order of said referee, which petition was allowed and heard upon the certificate of said referee; that said certificate did not contain, however, and said referee did not certify to this Honorable Court, said stipulation dated May 11, 1940, nor certify the existence of the facts therein set forth, thus preventing the consideration by this Honorable Court of the matters therein contained and the facts therein established; that thereafter said petition was dismissed by this

Honorable Court on December 7, 1940, as being premature for the reason that said stipulation was not certified to this Honorable Court, and for the reason that the Court concluded that the matter was heard upon a motion to dismiss only; and that the proceeding was remanded to said referee for further proceedings.

XII.

That thereafter, and on or about the 12th day of December, 1940, your petitioners duly filed with said referee and served on said trustee, their certain "Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout and Luther M. Say for Release and Delivery of Possession of a Certain Distilled Spirits Still," [42] a copy of which is attached hereto as Exhibit C, and made a part hereof for all purposes with the same force and effect as though herein set forth at length.

XIII.

That in said Answer and Petition petitioners admitted the allegations of said petition respecting their employment and office, the requirements of the Alcoholic Beverage Control Act of the State of California therein referred to, and that petitioners had demanded that said trustee apply for an appropriate license for the continued possession of said still, and denied all of the other allegations contained in said petition.

XIV.

That in said Answer and Petition petitioners alleged that the trustee had not applied for and did not possess a still license or permit from any officer of the State of California permitting him to possess the same, and that by reason of the operation of the provisions of the Alcoholic Beverage Control Act of the State of California and the failure to license said still, the same became and was forfeited to the State of California as provided by the Alcoholic Beverage Control Act of the State of California; and alleged that it was the duty of petitioners to seize and take possession of stills and other property forfeited to the State of California by virtue of said Act, to hold the same for the purposes of such forfeitures, and to cause the commencement and prosecution of appropriate actions in the appropriate courts of the State of California for the confirmation of such forfeitures.

XV.

That petitioners in said Answer and Petition prayed [43] that by appropriate order of this court said still be delivered to them for the purposes of said Act, and that they be granted leave to proceed pursuant to the provisions of the statutes of said state with respect to the seizure and forfeiture of said still.

XVI.

That thereafter said trustee answered the allegations of said Answer and Petition of petitioners by

an answer in writing dated May 6, 1941, a copy of which is attached hereto as Exhibit D and made a part hereof for all purposes with the same force and effect as though herein set forth at length.

XVII.

That thereafter the above-entitled proceeding came on for further hearing before said referee on the 24th day of May, 1941, upon the pleadings and documents hereinbefore described; that at said hearing testimony was offered and received on behalf of said trustee to the effect that the trustee was of good character, had refused to procure the still license required by said Act upon the advice of his attorney and the direction of the referee, and because he had no moneys in his possession with which to pay the fee required for such still license; that he had acted as the trustee in another proceeding in this court involving a similar still, and that he had not filed an application therein to procure still licenses upon the advice of counsel and the direction of said referee, although in that proceeding he did have funds with which to pay the fee required for such still license; that at said hearing said trustee and petitioners introduced into evidence by stipulation certain correspondence between counsel for [44] said trustee and counsel for said petitioners, and letters as follows:

Communication dated January 22, 1940, addressed by Earl Warren, Attorney General (by J. Albert Hutchinson, Deputy) to Frank C. Lerrigo, Esq.;

Communication dated April 18, 1940, addressed by Frank C. Lerrigo, Esq. to Mr. Earl Warren, Attorney General;

Communication dated October 2, 1940, addressed by Frank C. Lerrigo, Esq. to J. Albert Hutchinson, Deputy Attorney General;

Communication dated October 10, 1940, addressed by Frank C. Lerrigo, Esq. to Mr. J. Albert Hutchinson, Deputy Attoroney General;

that copies of said communications are attached hereto as Exhibit E and made a part hereof for all purposes with the same force and effect as though herein set forth at length; that said communications establish that said trustee was the trustee of Kearney Winery Company, Inc., as well as trustee herein, and possessed certain distilled spirits stills formerly belonging to that bankrupt corporation, which bankruptcy proceeding was pending in this court; that petitioners demanded, on behalf of the State of California, that appropriate licenses be procured by said trustee; that following said demand a conference was held by representatives of petitioners and other officers of the State of California and a representative of said trustee, at which time said representatives reached an understanding that said trustee would immediately procure licenses for said stills in said estates; that thereafter, in violation of said understanding, said trustee and said referee refused to apply and to permit the

application for said licenses; that thereupon [45] said trustee required the procurement of the temporary restraining order herein from said referee; that said trustee persistently refused to apply for a license until after the denial of petitioner's petition for review on December 7, 1940, by this Court, as aforesaid;

That at said hearing petitioners and said trustee executed through their respective counsel and submitted as evidence in this proceeding said stipulation dated May 24, 1940, a copy of which is attached hereto as Exhibit B, as aforesaid; that it is established by said stipulation that at all times subsequent to July 1, 1939, said still was possessed by said bankrupt, and subsequent to August 12, 1939, by said Bankrupt as a debtor in possession, and subsequent to November 22, 1939, by said trustee without any license, permit or consent to the possession of the same by said parties or either of them as owner or officer of this court, or otherwise; and that said trustee refused to apply for a license to possess said still until on or about December 11, 1940.

XVIII.

That thereafter and on or about June 12, 1941, said referee made and entered his certain "Order on Petition for Restraining Order and Order to Show Cause, Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout, et al. for Release

and Delivery of Possession of a Certain Distilled Spirits Still," a copy of which is attached hereto as Exhibit F and made a part hereof for all purposes with the same force and effect as though herein set forth at length; that in said order said referee found in part as follows: [46]

" * * * that on August 12, 1939, the above named bankrupt filed a debtor's petition under the provisions of Section 322 of the Bankruptcy Act; that thereafter and on November 18, 1939, Malter was adjudicated a bankrupt and on November 22, 1939, Green was appointed trustee and he thereafter qualified as such trustee and has continued to act as such trustee and as such came into the possession of said dismantled still; that said trustee has neither operated or has he contemplated the operation of said still;

That on or about the 22nd day of January, 1940, Deputy Attorney General J. Albert Hutchinson requested of the trustee's counsel that the trustee apply for a license with the State Board of Equalization; that at said time and for a long time thereafter the trustee was absolutely without any funds whatsoever;

That all of the allegations of the trustee's petition for restraining order filed herein on April 18, 1940, are true; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California;

That thereafter, said trustee having converted some of the assets into money, on or about the 11th day of December, 1940, made written application on forms provided by the State Board of Equalization of the State of California for a license on said still and accompanied said application with a certified check in the proper amount; that said trustee is a person of good reputation; that although said State Board of Equalization has had said application and said certified check for more than five months they have neither granted or denied said application. * * *''

That said referee did in said order grant the prayer of said trustee's petition and continue the said temporary restraining order in full force and effect until action is taken by the State Board of Equalization upon the application of said trustee for a license, and deny the petition of petitioners for leave to commence forfeiture proceedings and all other relief prayed for by petitioners in said proceeding until action is taken by the State Board of Equalization upon the application of said trustee for a license and until further order of the referee, and retained jurisdiction of the proceeding to entertain pending or further petitions in the premises [47] after action by said State Board of Equalization upon the said trustee's application for a license.

XIX.

That said restraining order dated April 18, 1940, and above described, and said order dated October 26, 1940, and said order dated June 12, 1941, continuing said restraining order in effect, and the latter granting the prayer of said trustee and denying to petitioners any relief upon their petition for leave to commence forfeiture proceedings to determine the existence of the forfeiture of said still, and above described, are, and each of them is, erroneous, in that:

(1) This Court, by and through said Honorable Samuel F. Hollins, referee thereof, or otherwise, lacks jurisdiction of the subject-matter of the cause of action set forth and alleged in said purported petition of said trustee;

(2) Said referee and this Court lack jurisdiction of the persons of petitioners in their said respective official capacities;

(3) Said orders are and each of them is against law in that:

(a) It is not a proper proceeding for injunctive relief of the nature granted by said orders;

(b) An adequate remedy at law exists on the purported claims and causes of action set forth in said petition;

(c) There is an insufficiency of evidence to support the findings of said referee and to support said orders; [48]

(4) Said orders deny to petitioners, as officers of the State of California, leave to commence appropriate actions in the courts of said state for the purpose of determining and enforcing a forfeiture occurring by (a) the unlawful possession by said bankrupt prior to the attaching of jurisdiction of the court herein, and (b) the unlawful possession by said trustee as trustee herein;

(5) Said orders restrain petitioners, as officers of the State of California, from the enforcement of a public statute of that state enacted for the public benefit;

(6) Said orders restrain petitioners, as such officers, from the enforcement of penal laws respecting the unlawful possession of an unlicensed still;

(7) Said orders authorize and direct said trustee to violate the penal provisions of said Act and the provisions thereof imposing a tax for the privilege of possessing a distilled spirits still.

Wherefore, your petitioners pray:

(1) That this proceeding be certified to the District Court of the United States, Southern District of California, Northern Division, for a review by that court;

(2) That said orders be reviewed and reversed by said court;

(3) That said petition of said trustee for restraining order or injunction be dismissed; [49]

(4) That said temporary restraining order and said orders continuing the same in effect be vacated, set aside and held for naught;

(5) That the prayer of petitioners in said "Answer and Petition for Restraining Order" and for leave to commence and prosecute proceedings in the courts of the State of California with respect to the forfeiture of said still be granted;

(6) That petitioners be awarded their costs of suit herein incurred and incurred upon said review; and

(7) That the following be certified to the court for review by the referee herein:

(a) Petition for Restraining Order and Order to Show Cause.

(b) Restraining Order and Order to Show Cause, dated May 11, 1940.

(c) Motion to Dismiss.

(d) Notice of Motion to Dismiss.

(e) Stipulation dated May 11, 1940.

(f) Order Denying Motion to Dismiss and Order Continuing Restraining Order, dated May 26, 1940.

(g) Answer and Petition of George M. Stout and Luther M. Say.

(h) Answer of Bert M. Green, Trustee, to Petition of George M. Stout and Luther M. Say.

(i) Stipulation of May 24, 1941. (Note: This stipulation was filed on or about June 10,

1941, and may have been erroneously dated [50] by counsel for trustee as of date June 7, 1941;

(j) Order on Petition dated June 12, 1941.

(k) Testimony and documentary evidence offered and rejected, and testimony and documentary evidence offered and received by the referee at the hearing of said proceeding on May 24, 1941, and motions, objections, rulings thereon, and rulings on evidence.

Respectfully submitted,

EARL WARREN

Attorney General of the State
of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M. Stout
and Luther M. Say [51]

State of California,
City and County of San Francisco—ss.

J. Albert Hutchinson, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioners named in the foregoing petition; that as such he is acquainted with the matters therein set forth, and that except as to those matters which are therein stated on information or belief, the statements therein are true of his own knowledge, and as to the latter he believes the same to be true; that said petitioners and each of them reside outside of

the City and County of San Francisco, State of California, the place where affiant maintains his office; and that affiant is authorized to and does hereby make this verification by and upon behalf of said petitioners.

J. ALBERT HUTCHINSON

Subscribed and sworn to before me this 19th day of June, 1941.

(No Seal)

CHAS. W. JOHNSON

Deputy Attorney General of
the State of California

[Endorsed]: Filed Jun. 21, 1941. Samuel F. Hollins, Referee. Filed Jul. 24, 1941. R. S. Zimmerman, Clerk. [52]

EXHIBIT A

[Title of District Court and Cause.]

RESTRAINING ORDER AND ORDER
TO SHOW CAUSE.

At Fresno, in said District, on the 18th day of April, 1940.

Upon reading the verified petition of Bert M. Green, Trustee in Bankruptcy of George Hugo Malter, the above named bankrupt, duly filed herein; upon all the other papers filed and proceedings had herein; and upon motion of Frank C. Lerrigo, attorney for said trustee, and good cause appearing therefor,

It Is Ordered that George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the California State Board of Equalization, and each and every person acting for and in aid and assistance of the said George M. Stout as California State Liquor Administrator, and Luther M. Say as Chief Liquor Control Officer of District D of the State of California, and their agents and employees, be, and each of them is hereby restrained until the hearing of this order, and until the further order of this Court from seizing that certain still for the distillation of spirituous liquors, now located on the premises, belonging to the estate of George Hugo Malter, a bankrupt, the said premises [53] being described as follows: Real property in the County of Fresno, State of California, described as follows:

The East half of Lot 31 of Easterby Rancho, according to the map thereof recorded June 24, 1880 in Pat Book 2 at page 6, in the office of the County Recorder of said County,

and which premises and the said still located thereon are now under the jurisdiction and control of Bert M. Green, as Trustee in Bankruptcy, for George Hugo Malter, bankrupt, and the said George M. Stout and Luther M. Say, their agents and employees are further restrained from interfering in any way with the possession and control of said still by Bert M. Green, as such Trustee in Bankruptcy, and

from interfering in any way with the orderly administration of the estate of said bankrupt until the further order of this Court.

It Is Further Ordered, that George M. Stout as such State Liquor Administrator, and the said Luther M. Say, as Chief Liquor Control Officer of District D of the State of California, shall appear before this Court at the courtroom located in the Pacific Southwest Building, at Room 710 thereof, on the 11th day of May, 1940, at nine-thirty o'clock A. M., of said day, then and there to show cause if any they have, why the said restraining order shall not continue in full force and effect, and why such other and further order should not be made as may be proper in the premises.

Dated at Fresno, California, this 18 day of April, 1940.

SAMUEL F. HOLLINS

Referee in Bankruptcy of
said Court. [54]

EXHIBIT B

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed, by and between George M. Stout, California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, of District "D" of the California

State Board of Equalization, by Earl Warren, Attorney General of the State of California, and J. Albert Hutchinson, Deputy Attorney General, and Bert M. Green, as Trustee in Bankruptcy for George Hugo Malter, Bankrupt, by Frank C. Lerrigo, his attorney, that the following related facts are true and correct and shall be considered as evidence in the hearing of the petition of Bert M. Green, Trustee in Bankruptcy, for George Hugo Malter, Bankrupt, for a Restraining Order restraining George M. Stout, as California State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer, from seizing a certain still in possession of Bert M. Green, as said Trustee in Bankruptcy for George Hugo Malter, said facts being as follows, to-wit:

That on or about August 12th, 1939, George Hugo Malter was the owner and possessor of a certain still for the distillation of spirituous liquors; that at said time said George Hugo Malter was not the owner and holder of a license from the State of California under the *provisions* of the alcoholic beverage control act, Statutes of 1935, Chapter 330, [55] as amended, permitting him to own, possess and operate said still, his said license having expired on June 30th, 1939, and at the time of the threatened seizure referred to in the petition herein.

That on the 12th day of August, 1939, said George Hugo Malter filed a debtor's petition in the above entitled court under the provisions of Section 322 of the Bankruptcy Act of the United States; that there-

after on November 18th, 1939, said George Hugo Malter was adjudicated a bankrupt by the United States District Court, Southern District of California; that on or about November 22nd, 1939, Bert M. Green was duly appointed Trustee in Bankruptcy of the estate of George Hugo Malter, Bankrupt, and thereafter qualified as such Trustee and ever since such time has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy for the Estate of George Hugo Malter, Bankrupt;

That as such Trustee, said Bert M. Green has come into the possession of said still, owned by the said bankrupt at the time of the filing of his petition in bankruptcy; that said still is dismantled and has not been operated by said Trustee, nor does said Trustee contemplate the operation of said still; that Bert M. Green, as such Trustee refused to apply for a license to possess or operate said still until on or about December 11th, 1940, at which time he did apply for said still license, and said application has not been granted or denied by the State Board of Equalization of the State of California; that the said Trustee owns and possesses said still only in his capacity as Trustee in Bankruptcy of the Estate of George Hugo Malter, Bankrupt;

That by reason of the refusal of Bert M. Green, as such Trustee to apply for and receive the said license from the State of California under the pro-

visions of the said Alcohol [56] Beverage Control Act, George M. Stout as California State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer for District "D" of the State of California Board of Equalization have threatened and are now threatening to seize said still under the forfeiture provisions of the said Alcohol Beverage Control Act of the State of California, and to remove the said still from the possession and control of Bert M. Green, as said Trustee in Bankruptcy, and the Bankruptcy Court of the United States.

Dated at Fresno, California, this 24th day of May, 1941.

EARL WARREN,

Attorney General

By J. ALBERT HUTCHINSON

Attorney for George M. Stout,
California State Liquor Administrator, and Luther M. Say, Chief Liquor Control Officer, of District "D" of the California State Board of Equalization.

FRANK C. LERRIGO

Attorney for Bert M. Green,
Trustee in Bankruptcy. [57]

EXHIBIT C

[Title of District Court and Cause.]

ANSWER OF GEORGE M. STOUT AND
LUTHER M. SAY TO PETITION FOR RE-
STRAINING ORDER, AND PETITION OF
GEORGE M. STOUT AND LUTHER M.
SAY FOR RELEASE AND DELIVERY OF
POSSESSION OF A CERTAIN DISTILLED
SPIRITS STILL.

Now Come George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization of said state, and answer the petition of Bert M. Green, trustee in the above-entitled action, dated April 18, 1940 for restraining order, and for answer thereto admit, deny and aver as follows: [58]

I.

Answering respondents have no knowledge or information sufficient to enable them to form a belief concerning the truth or falsity of the matters set forth and alleged in said petition on pages 1 and 2 thereof, to and including line 18 of said last-numbered page, and that portion of said petition appearing on page 3 commencing with line 10 through line 19 on said last-numbered page, and placing their answer upon the ground that they have no knowledge, information or belief, deny conjunctively and disjunctively, generally and specifically, each and

every, all and singular, the allegations contained in said portions of said petition, and each of said allegations.

II.

Answering respondents admit the allegations contained in said petition commencing with line 19 on page 2 through line 10 on page 3, save and except that statement contained on page 2 thereof commencing on line 28, and reading as follows:

“That your petitioner has no funds belonging to said estate and has not operated said still and does not intend to operate said still and said still cannot be operated without expenditure of substantial funds in rebuilding said still.”——

concerning the truth or falsity of which quoted statement answering respondents have no knowledge or information sufficient to form a belief, and placing their answer upon that ground, answering respondents deny conjunctively and disjunctively, generally and specifically, each and every, all and singular, the allegations and statements contained in said quoted statement of said petition.

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[59]

Further answering said petition, and as and for a separate answer thereto, and as and for a petition and claim on behalf of the People of the State of California, answering respondents admit, deny and aver as follows:

I.

That the still described in said petition of Bert M. Green and dated April 18, 1940, reference to which is hereby made, and which is hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length, at all times therein and herein mentioned has been and now is an alcoholic beverage still; that since the 18th day of November, 1939 said still has not been licensed to any person by the State Board of Equalization of the State of California; that said Bert M. Green has not applied for nor received, and does not hold, any license or permit of the said State Board of Equalization or of any other officer of the State of California permitting him to possess said still; that said still has been at all of said times located within the State of California and is now within said state.

II.

That by reason of the facts alleged in said petition and herein, said still has been forfeited to the State of California by virtue of and pursuant to the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes 1935, Chapter 330, as amended); that it is the duty of answering respondents to seize and take possession of stills and other property forfeited to the State of California by virtue of said Act, and to hold the same for the purpose of such forfeitures, and spe-

cifically that it is the duty of answering respondents to seize and take possession of said [60] still pursuant to said Act, and to thereafter cause the commencement of an action in the appropriate courts of the State of California for the confirmation of said forfeiture by the appropriate officers of the State of California.

Wherefore, answering respondents pray that the restraining order and injunction herein sought by said Bert M. Green, trustee in the above-entitled proceeding, be denied; that the temporary restraining order of the referee made and executed herein on the 18th day of April, 1940, restraining answering respondents from seizing said still and interfering with the possession and control of said still by said Bert M. Green until further order of said court, and that certain order dated October 26, 1940, by said referee, continuing said restraining order of April 18, 1940 in full force and effect until further order of the court, be recalled, annulled and set aside; that Bert M. Green, trustee take nothing by reason of his said petition, or otherwise; that answering respondents herein be given possession of said still as required by law, for the purposes of said statutes of the State of California; and that the court make and enter its order releasing to answering respondents said still, and directing said trustee to deliver possession of the same to them for the purposes of said statutes, as aforesaid, with leave to answering respondents and other appropriate offi-

cers of the State of California to proceed pursuant to the provisions of the statutes of said state.

EARL WARREN

Attorney General of the State
of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M. Stout
and Luther M. Say [61]

State of California,
City and County of San Francisco—ss.

J. Albert Hutchinson, being first duly sworn, deposes and says:

That he is one of the attorneys for the answering respondents and petitioners in the foregoing Answer and Petition; that as such he is acquainted with the matters therein set forth, and that except as to those matters which are therein stated on information or belief, the statements therein are true of his own knowledge, and as to the latter he believes the same to be true; that said answering respondents and petitioners and each of them reside outside of the City and County of San Francisco, State of California, the place where affiant maintains his office; and that affiant is authorized to and does hereby make this verification by and upon behalf of said answering respondents and petitioners.

J. ALBERT HUTCHINSON

Subscribed and sworn to before me this 12th day of December, 1940.

(No Seal)

JAMES E. SABINE

Deputy Attorney General of
the State of California [62]

EXHIBIT D

[Title of District Court and Cause.]

ANSWER OF BERT M. GREEN, TRUSTEE IN
BANKRUPTCY FOR GEORGE HUGO
MALTER TO PETITION OF GEORGE M.
STOUT AND LUTHER M. SAY FOR RE-
LEASE AND DELIVERY OF POSSESSION
OF DISTILLED SPIRITS STILL.

Now comes Bert M. Green, Trustee of the above named bankrupt and answers the petition of George M. Stout and Luther M. Say for release and delivery of possession of a certain distilled spirits still and for an answer thereto, admits, denies and alleges as follows, to-wit:

I.

Bert M. Green, as said Trustee denies generally and specifically, conjunctively and disjunctively each and every, all and singular the allegations contained in said petition, not in Trustee's petition for restraining order and injunction, and in that

certain stipulation by the parties hereto, dated May 11th, 1940, expressly admitted to be true.

As and for a Separate, Distinct and Affirmative Defense to the Said Claim and Petition of Luther M. Say and George M. Stout, Bert M. Green, as Trustee in Bankruptcy, Alleges as Follows, to-wit:

[63]

I.

That the said Bert M. Green, as said trustee failed and refused to procure a still license as of May the 11th, 1940, the date of the above referred to stipulation under an honest mistake of law, and since that time has duly applied for a still license from the State of California authorizing him to possess the said still, and has tendered the legal fee required for the said still license; that the said Bert M. Green is a fit and proper person to receive a still license and the premises upon which said still is located are proper premises for the location of a still; that the State Board of Equalization has not acted on the application of the said Bert M. Green, said trustee, for a still license; that the said Bert M. Green has complied with all the laws of the State of California, concerning the application for a still license, and by reason of the said application and by reason of the right of said Bert M. Green to have a still license, the said still is legally possessed by the said Bert M. Green.

Wherefore, the said Bert M. Green prays that the injunction and restraining order issued by the

above entitled court, restraining and enjoining George M. Stout and Luther M. Say from doing any act to interfere with the possession of said still license may continue in full force and effect, and that the petition and claim of George M. Stout and Luther M. Say for the possession and seizure and forfeiture of said still be dismissed.

BERT M. GREEN

Petitioner

FRANK C. LERRIGO

Attorney for Petitioner [64]

State of California,
County of Fresno—ss.

Bert M. Green, being first duly sworn deposes and says:

That he is the Trustee in Bankruptcy for George Hugo Malter, bankrupt; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters he believes it to be true.

BERT M. GREEN

Subscribed and sworn to before me this 6th day of May, 1941.

[Seal]

F. C. LERRIGO

Notary Public in and for the County of Fresno,
State of California. [65]

EXHIBIT F

[Title of District Court and Cause.]

ORDER ON PETITION FOR RESTRAINING
ORDER AND ORDER TO SHOW CAUSE,
ANSWER OF GEORGE M. STOUT AND
LUTHER M. SAY TO PETITION FOR RE-
STRAINING ORDER, AND PETITION OF
GEORGE M. STOUT, ET AL. FOR RE-
LEASE AND DELIVERY OF POSSESSION
OF A CERTAIN DISTILLED SPIRITS
STILL.

At Fresno, California, in said District, on the 12th day of June, 1941. Upon the petition of Bert M. Green, Trustee, for restraining order and order to show cause filed herein on April 14, 1940, and the answer of George M. Stout and Luther M. Say, and petition of said Stout, et al, for release and delivery of possession of a still, filed herein on May 7, 1941, upon the bankruptcy petition, the order of adjudication, and upon all other papers and proceedings had herein, and upon due consideration of the testimony of the witnesses and other evidence, and after hearing Frank C. Lerrigo, attorney for the Trustee, and J. Albert Hutchinson, deputy attorney general, in opposition to the trustee's petition and in support of the petition of George M. Stout, et al, for the release and delivery of possession of a still, the Referee hereby finds that on or about August 12, 1939, the above named bankrupt was the owner and possessor of a dismantled still

for the distillation of liquor; that on August 12, 1939, the [66] above named bankrupt filed a debtor's petition under the provisions of Section 322 of the Bankruptcy Act; that thereafter and on November 18, 1939, Malter was adjudicated a bankrupt and on November 22, 1939, Green was appointed trustee and he thereafter qualified as such trustee and has continued to act as such trustee and as such came into the possession of said dismantled still; that said trustee has neither operated or has he contemplated the operation of said still;

That on or about the 22nd day of January, 1940, Deputy Attorney General J. Albert Hutchinson requested of the trustee's counsel that the trustee apply for a license with the State Board of Equalization; that at said time and for a long time thereafter the trustee was absolutely without any funds whatsoever.

That all of the allegations of the trustee's petition for restraining order filed herein on April 18, 1940, are true; that since the 18th day of November, 1939, said still has not been licensed to any person by the State Board of Equalization of the State of California;

That thereafter, said trustee having converted some of the assets into money, on or about the 11th day of December, 1940, made written application on forms provided by the State Board of Equalization of the State of California for a license on said still and accompanied said application with a certified check in the proper amount; that said trustee

is a person of good reputation; that although said State Board of Equalization has had said application and said certified check for more than five months they have neither granted or denied said application.

Now, upon motion of Frank C. Lerrigo, Esq., attorney for said Trustee, it is

Ordered that the prayer of said trustee's petition be and the same is hereby granted, and said temporary restraining [67] order is hereby continued in force and effect until action is taken by the State Board of Equalization upon the application of the trustee for a license, and the petition of respondents Stout, et al, is hereby denied until action is taken by the State Board of Equalization upon the application of the trustee herein for a license, and until the further order of the Court. Jurisdiction of the Referee is hereby retained to entertain pending or future petitions in the premises, after action by the State Board of Equalization upon the trustee's application for a license herein.

SAMUEL F. HOLLINS

Referee in Bankruptcy [68]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrigo, the attorney of record of the trustee, Bert M. Green for the above-named bankrupt, maintains an office at Pacific Southwest Bldg. in Fresno County of Fresno State of California; and between said two places there is a regular communication by mail; on the 20 day of June, 1941, I served a true copy of the Petition for Review of Order of Referee herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

VERNON C. PALMER

Subscribed and sworn to before me, this 20 day of June, 1941.

CHAS. W. JOHNSON

Deputy Attorney General

[Endorsed]: Filed Jun. 21, 1941. Samuel F. Hollins, Referee. Filed Jul. 24, 1941. R. S. Zimmerman, Clerk. [68-A]

[Title of District Court and Cause.]

Notice is hereby given that the Certificate and Report of Referee on Petition of George M. Stout, as State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization, to Review Order of Referee was filed with the Clerk of the above entitled Court on the 23rd day of July, 1941, and in the ordinary course of events should be on the calendar on 13th day of October, 1941.

Dated: July 23, 1941.

SAMUEL F. HOLLINS

Referee in Bankruptcy

[Endorsed]: Filed Jul. 24, 1941. [69]

[Title of District Court and Cause.]

NOTICE OF TIME AND PLACE OF HEARING
UPON CERTIFICATE FOR REVIEW

To Bert M. Green, Trustee in the above entitled proceeding and to Frank C. Lerrigo, his Attorney:

You and each of you will please take notice that the certificate and report of Referee on petition of George M. Stout, as State Liquor Administrator and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization,

to review order of Referee was filed with the Clerk of the above entitled Court on the 23rd day of July, 1941.

You will please take further notice that said George M. Stout and Luther M. Say will, on Monday, the 13th day of October, 1941, move the above entitled Court for review of said certificate and report of Referee and will at said time move the above entitled Court for its order reversing that certain [70] restraining order and order to show cause of said Referee made on April 18, 1940, and that certain order of said Referee, dated June 12, 1941, and restraining and enjoining said George M. Stout and said Luther M. Say in their said official capacities from enforcing the Alcoholic Beverage Control Act of the State of California with respect to said Trustee, both of which orders are more particularly described and set forth in said certificate and report of said Referee.

You will please take further notice that said hearing and said motions will be made in the Court Room of the above entitled Court, at the Federal Building, Civic Center, Fresno, California, at the hour of ten o'clock A. M., of said October 13, 1941, or as soon thereafter as counsel may be heard, and if not heard on said date to be continued from day to day until the same has been heard and submitted.

Dated: September 5, 1941.

EARL WARREN

Attorney General of the State
of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M. Stout
and Luther M. Say

[Endorsed]: Filed Sep. 9, 1941. [71]

AFFIDAVIT OF SERVICE BY MAIL

State of California,

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrego the attorney of record of the above-named George Hugo Malter, Bankrupt maintains an office at Rowell Building in Fresno, County of Fresno, State of California; and between said two places there is a regular communication by mail; on the 5th day of September, 1941, I served a true copy of the Notice of Time and Place of Hearing Upon Certificate for Review herein, to the original of which this affidavit is attached, on said last-named

attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

MARIE MYERS

Subscribed and sworn to before me, this 5th day of September, 1941.

J. ALBERT HUTCHINSON

Deputy Attorney General

[Endorsed]: Filed Sep. 9, 1941. [72]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND MEMORAN-
DUM IN BEHALF OF UNITED STATES
OF AMERICA

Comes now the United States of America, by William Fleet Palmer, United States Attorney, and Walter M. Campbell, Assistant United States Attorney, and appears specially for the purpose of objecting to the jurisdiction of this Court to grant the relief sought herein by the petition of George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, to review and set aside the order of the Referee in Bankruptcy herein made and entered on the 12th day of June, 1941, wherein a certain temporary restraining order

theretofore issued by the said Referee against Petitioners was continued in force.

That the grounds of opposition to such petition are as follows:

(1) The United States of America is a necessary party to any determination of title or right to possession of the personal property involved;

(2) The appeal of the State Officers is premature.

I.

The United States Is a Necessary Party

It has been admitted that the United States, acting through the Collector of Internal Revenue, had filed its claim in the bankrupt estate for \$710.73 unpaid distilled spirits taxes. The Revenue Law makes such unpaid taxes a first lien upon the still (Rev. Stat. 3251).

It is further to be noted that no claim was filed in [73] the Estate by the State Officers, they seeking the remedy (as disclosed by their petition) of forfeiture of the still by the State Courts.

A complete determination therefore required the presence of the Collector of Internal Revenue before the Referee. To do otherwise would both defeat the inherent power of the sovereignty over taxes, and subject it without its consent to the jurisdiction of the State Courts.

See: United States vs. Western Fruit Growers, 34 FS 794, D. C., So. Dist. Calif.)

II.

The Appeal Is Premature

The petition for review filed by the State Officers seeks to review what is no more than an interlocutory order of the Referee. Under such situation as disclosed in the Referee's Certificate no appeal will be allowed until a final order is made.

Pearson vs. Higgins, 32 F. 2(d) 27, 28.

See also *In re California Pea Products*, 37 Fed. Supp. 658, 660.

Respectfully submitted,

WM. FLEET PALMER

United States Attorney

WALTER M. CAMPBELL

Assistant United States
Attorney

Received copy October 21, 1941.

J. ALBERT HUTCHINSON

[Endorsed]: Filed Oct. 21, 1941. [74]

United States District Court, Southern District of
California, Northern Division

No. 5186

In the Matter of

GEORGE HUGO MALTER,

Bankrupt.

ORDER

The court is of the opinion that the findings of the referee are supported by the statement of the evidence presented to the court in the referee's cer-

tificate and report. Said findings are adopted by the court.

It is, therefore, ordered that the petition of George M. Stout as State Liquor Administrator of the State of California and Luther M. Say as Chief Liquor Control Officer of District D of the State Board of Equalization be and it is hereby denied as to the prayer for reversal of the referee's orders and that said petitioners' prayer be and it is denied as to subdivisions 3, 4, 5 and 6 thereof.

It is further ordered that the order of the referee for injunction be and it is hereby modified as follows: said Board of Equalization of the State of California, its officers, agents, employees and attorneys are, and each of them is, enjoined and restrained from in any manner enforcing or attempting to enforce the provisions of the Alcoholic Beverage [75] Control Act of the State of California (Statutes 1935, Chapter 330, as amended) against the estate of George Hogo Malter, bankrupt, and its trustee, Bert M. Green; without prejudice, however, to the filing by the Board of Equalization of any claim for any license fees which such Board may deem advisable to present as a claim for expenses of administration incurred by the trustee in the course of administration of the bankrupt estate.

Dated: November 22, 1941.

C. E. BEAUMONT

United States District Judge

[Endorsed]: Filed Nov. 22, 1941. [76]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Bert M. Green, Trustee for George Hugo Malter, Bankrupt; and

To Frank C. Lerrigo, Esq., his attorney:

You and Each of You Will Please Take Notice, and You Are Hereby Notified, that George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, do, and each of them does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Judgment entered in the above-entitled court and dated November 22, 1941, denying the Petition of George M. Stout, as State Liquor Administrator of the State of California, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization for Review of Order of Referee, filed on or about June 21, 1941, as to subdivisions (3), (4), (5) and (6) of the [77] prayer in said petition of said petitioners, and modifying those certain orders of the Referee in Bankruptcy of the above-entitled court in the above-entitled proceeding, dated respectively April 18, 1940, October 26, 1940 and June 12, 1941, and continuing in effect said orders in so far as the same restrain said petitioners and the State Board of Equalization of the State of California, its of-

ficers, agents, employees and attorneys from in any manner enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes 1935, Chapter 330, as amended) against the estate of the bankrupt above named and the trustee thereof, Bert M. Green, without prejudice, however, to the filing by said Board of a claim for license fees as expenses of administration of said estate; and from the whole of said Order and Judgment.

Reference is hereby made to:

- (1) Said Order and Judgment;
- (2) The Certificate and Report of Referee on Petition of George M. Stout, as State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization to Review Order of Referee;
- (3) Said Petition of George M. Stout, as State Liquor Administrator, and Luther M. Say, as Chief Liquor Control Officer of District D of the State Board of Equalization for Review of Order of Referee;
- (4) Said Orders of said Referee;

heretofore filed herein, and the same are and each of them is hereby by such reference made a part hereof for all purposes with the same force and effect as though the same were herein set forth at length.

Dated: December 18, 1941.

EARL WARREN

Attorney General of the
State of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for George M.
Stout and Luther M. Say

JAH:YC 12-18-41

[Endorsed]: Filed Dec. 20, 1941. Mailed copy to Atty. for Trustee, Appellee, 12/22/41. ELS. Mailed copy to U. S. Atty. 2/18/42, E.L.S. [78]

AFFIDAVIT OF SERVICE BY MAIL

State of California

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrigo the attorney of record of the trustee, Bert M. Green, for the above-named bankrupt, maintains an office at Pacific Southwest Bldg. in Fresno County of Fresno State of California; and between said two places there is a regular communication by mail; on the

18th day of December, 1941, I served a true copy of the Notice of Appeal herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

YOLANTHE CANTRELL

Subscribed and sworn to before me, this 18 day of December, 1941.

CHAS W. JOHNSON

Deputy Attorney General

[Endorsed]: Filed Dec. 20, 1941. [79]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE RECORD
ON APPEAL.

Now Come George M. Stout and Luther M. Say, as State Liquor Administrator of the State of California and Chief Liquor Control Officer of District D of the State Board of Equalization, respectively, appellants herein, and designate the portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

1. Petition for Review of Order of Referee, including exhibits as follows:
 - A. Petition for Restraining Order and Order to Show Cause
 - B. Restraining Order and Order to Show Cause [80]
 - C. Motion to Dismiss
 - D. Notice of Motion to Dismiss
 - E. Stipulation dated May 11, 1940
 - F. Order Denying Motion to Dismiss and Order Continuing Restraining Order
 - G. Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout and Luther M. Say for Release and Delivery of Possession of a Certain Distilled Spirits Still
 - H. Answer of Bert M. Green, Trustee, to Petition of George M. Stout and Luther M. Say for Release and Delivery of Possession of Distilled Spirits Still
 - I. Stipulation dated May 24, 1941
 - J. Order on Petition for Restraining Order and Order to Show Cause, Answer of George M. Stout and Luther M. Say to Petition for Restraining Order, and Petition of George M. Stout, et al. for Release and Delivery of Possession of a Certain Distilled Spirits Still
2. Certificate and Report of Referee on Petition of George M. Stout and Luther M. Say, etc.,

to Review Order of Referee (Dated July 23, 1941)

3. Notice of Filing of Certificate and Report of Referee

4. Notice of Time and Place of Hearing Upon Certificate for Review

5. Order and Judgment of Court November 22, 1941

6. Notice of Appeal

7. Bond on Appeal

8. Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal

Dated: January 19, 1942

EARL WARREN

Attorney General of the
State of California

J. ALBERT HUTCHINSON

Deputy Attorney General
Attorneys for Appellants

[Endorsed]: Filed Jan. 20, 1942. [81]

AFFIDAVIT OF SERVICE BY MAIL**Matter of Malter—Bankrupt****USDC****No. 5186**

State of California

City and County of San Francisco—ss.

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Frank C. Lerrigo the attorney of record of the trustee, Bert M. Green, for the bankrupt maintains an office at Pacific Southwest Bldg. in Fresno County of Fresno State of California; and between said two places there is a regular communication by mail; on the 19th day of January, 1942, I served a true copy of the Designation of Portions of Record, etc. to be Contained in Record on Appeal herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

HELEN MOUAT

Subscribed and sworn to before me, this 19 day of January, 1942

WALTER H. ROUNTREE

Deputy Attorney General

[Endorsed]: Filed Jan. 20, 1942. [82]

[Title of District Court, and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

CS# 5186 in Bankruptcy

Whereas, Petitioners George M. Stout, State liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, are about to appeal to the Circuit Court of Appeal for the Ninth Circuit from an order and judgment entered in said action on the 22nd day of November, 1941, in the District Court of the United States for the Southern District of California, Northern Division.

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellants that said Appellants will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate

seal to be hereto affixed this 31st day of December, 1941.

NATIONAL AUTOMOBILE
INSURANCE COMPANY

[Corporate By FRED W. WEITZEL
Seal] Attorney-in-Fact

State of California,
County of Los Angeles—ss.

On this 31st day of December, in the year 1941, before me, Helengene Duffin, a Notary Public in and [83] for said County and State, personally appeared Fred W. Weitzel known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal] HELENGENE DUFFIN

Notary Public in and for said County and State.

My commission expires Dec. 2nd, 1945.

[Endorsed]: Filed Dec. 31, 1941. [84]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 84 inclusive contain full, true and correct copies of: Certificate of Referee on Review; Motion to Dismiss Petition of Trustee for Restraining Order; Stipulation Dated May 11, 1940; Order of Referee Denying Motion to Dismiss; Petition for Review with Exhibits A, B, C, D, and F thereof; Notice of Filing Certificate on Review; Notice of Time and Place of Hearing and Affidavit of Service; Special Appearance of the United States; Order of District Judge upon Petition for Review; Notice of Appeal and Affidavit of Service; Designation of Record on Appeal and Affidavit of Service; Bond for Costs on Appeal; which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$15.35, which amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 24th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN

Clerk,

By: EDMUND L. SMITH

Deputy.

[Endorsed]: No. 10068. United States Circuit Court of Appeals for the Ninth Circuit. George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, Appellants, vs. Bert M. Green, Trustee of the Estate of George Hugo Malter, Bankrupt, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed February 25, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Judicial Circuit

No. 10,068

(On Appeal from Judgment of District
Court, Southern District, Northern Di-
vision—No. 5186, “Matter of Malter, Bank-
rupt.”)

GEORGE M. STOUT, State Liquor Administrator
of the State of California, and LUTHER M.
SAY, Chief Liquor Control Officer of District
D of the State Board of Equalization of the
State of California,

Appellants,

v.

BERT M. GREEN, Trustee of the Estate of George
Hugo Malter, Bankrupt,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL, AND DESIGNATION OF PARTS
OF RECORD TO BE INCLUDED IN REC-
ORD ON APPEAL

Now Come appellants, George M. Stout, as State
Liquor Administrator of the State of California,
and Luther M. Say, as Chief Liquor Control Offi-
cer of District D of the State Board of Equaliza-
tion of the State of California, and state that their
appeal is from the whole of the final judgment given,

made and entered in the above-entitled cause on the 22nd day of November, 1941, and that appellants will rely on their appeal herein on the following points:

I.

That the United States District Court, Southern District, Northern Division, erred in finding that the findings of the Referee are supported by the statement of the evidence presented to the court in the Referee's Certificate and Report.

II.

That said court erred in adopting as its findings the findings of the Referee.

III.

That said court erred in making and entering as its final judgment herein that the petition of George M. Stout, State Liquor Administrator of the State of California, and Luther M. Say, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California, be denied as to the prayer for reversal of the orders of the Referee, and that said petitioners' prayer be denied as to Subdivisions 3, 4, 5 and 6 of their said petition.

IV.

That said court erred in making and entering as its final judgment herein that said State Board of Equalization of the State of California, its officers, agents, employees and attorneys are and each of

them is enjoined and restrained from in any manner enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Act of the State of California (Statutes of California, 1935, Chapter 330, as amended) against the Estate of George Hugo Malter, Bankrupt, and its trustee, Bert M. Green; without prejudice, however, to the filing by the said State Board of Equalization of any claim for any license fees which said Board may deem advisable to present as a claim for expenses of administration incurred by the trustee in the course of administration of the bankrupt's estate.

V.

That said court erred in not finding that the orders made and entered herein by and through Honorable Samuel F. Hollins, Referee in Bankruptcy, dated April 18, 1940, October 26, 1940, and June 12, 1941, respectively, were and each of them is against law in that—

(a) It is not a proper proceeding for injunctive relief of the nature granted by said orders;

(b) An adequate remedy at law exists on the purported claims and causes of action set forth in said petition;

(c) There is an insufficiency of evidence to support the findings of said Referee and to support said orders.

VI.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that said orders denied to petitioners, as officers of the State of California, leave to commence appropriate actions in the courts of the State for the purpose of determining and enforcing a forfeiture occurring by (a) the unlawful possession by said bankrupt prior to the attaching of jurisdiction of the court herein, and (b) the unlawful possession by said trustee as trustee herein.

VII.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that said orders restrain petitioners, as officers of the State of California, from the enforcement of a public penal statute of the State of California enacted for the public benefit.

VIII.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that said orders restrain petitioners, as such officers, from the enforcement of penal laws respecting the unlawful possession of an unlicensed still.

IX.

That said court erred in not finding and concluding, and in not making and entering as its final

judgment herein, that said orders authorize and direct said trustee to violate the penal provisions of the Alcoholic Beverage Control Act of the State of California (Statutes of California, 1935, Chapter 330, as amended) and the provisions thereof imposing a tax for the privilege of possessing a distilled spirits still.

X.

That said court erred in not finding and concluding, and in not making and entering as its final judgment herein, that each and every, all and particular, the relief prayed for in petitioners' Petition for Review of Order of Referee—contained on page 66 of this Transcript of Record on Appeal, paragraphs I to VII, inclusive thereof—be granted.

XI.

Appellants hereby designate to be included in and to constitute the record on appeal in said cause all of the pleadings, orders and documents referred to in that certain "Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal", heretofore filed by appellants in the District Court of the United States, Southern District of California, Northern Division, in the proceeding entitled "In the Matter of George Hugo Malter, Bankrupt", numbered therein 5186, and contained on page 80 of this Transcript.

Dated : February 27, 1942.

EARL WARREN

Attorney General of the
State of California

J. ALFRED HUTCHINSON

Deputy Attorney General

WALTER H. ROUNTREE

Deputy Attorney General

Attorneys for Appellants

[Endorsed]: Filed Feb. 27, 1942. Paul P. O'Brien,
Clerk.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
IN AND FOR THE
NINTH CIRCUIT

GEORGE M. STOUT, State Liquor Administrator of the State of California,
and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

Appellants,

VS.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

EARL WARREN,
Attorney General of the
State of California,
J. ALBERT HUTCHINSON,
WALTER S. ROUNTREE,
Deputies Attorney General,
600 State Building,
San Francisco, California,
Attorneys for Appellants.

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No. 10068

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

GEORGE M. STOUT, State Liquor Administrator of the State of California,
and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

Appellants,

vs.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF

I

PRELIMINARY STATEMENT

This appeal is from a judgment of the District Court of the United States upon review of certain orders of a referee in bankruptcy of said court enjoining appellants, as State law enforcement officers, from enforcing the provisions of the Alcoholic Beverage Control Act of the State of Cali-

fornia (Statutes 1935, page 1123, as amended), and denying leave to appellants to prosecute an action in the courts of the State of California to confirm a statutory forfeiture of certain distillery equipment; in which the court adopted the findings of the referee as presented to the court in the Referee's Certificate and Report; refused to reverse said orders of the Referee; denied appellants' prayer for relief; and affirmed the orders of the referee; and further enjoined the State Board of Equalization of the State of California (though not a party to the proceedings) from in any manner enforcing or attempting to enforce said Alcoholic Beverage Control Act against the estate of the bankrupt or against appellee, its trustee.

II

STATEMENT AS TO JURISDICTION AND OF THE CASE

Since the facts of the case are relatively simple, a single statement will suffice for a determination of jurisdiction of this court and for a statement of the case. (References are to the printed transcript.)

On or about the 12th day of August, 1939, George Hugo Malter filed a debtor's petition under section 322 of the Bankruptcy Act, and proceedings thereunder were referred to Samuel F. Hollins, one of the referees in bankruptcy of said District Court; thereafter, and on or about the 18th day of November, 1939, the said debtor was duly adjudicated a

bankrupt, and on the 22nd day of November, 1939, Bert M. Green, the appellee, was duly appointed trustee of the bankrupt's estate and effects; appellee has been ever since and still is the trustee of said estate (Tr., p. 3); appellee took possession of the assets of said bankrupt, consisting of approximately five (5) acres of land, and equipment designed for the manufacture of brandy from grapes, including an alcoholic beverage still and its appurtenances (Tr., p. 22).

The law of the State of California has at all times material to this proceeding licensed the alcoholic beverage industry and prohibited the unlicensed possession of alcoholic beverage stills (Alcoholic Beverage Control Act, sections 2, 3,), and said statute is an exercise of the police power of the state (Alcoholic Beverage Control Act, section 1).

Appellants sought to induce appellee to secure a license for said distilling equipment as required by said Act, but appellee refused to apply for such license (Tr., pp. 32 and 35).

Since the 30th day of June, 1939, when the bankrupt's license terminated (Tr. 28), said still has not been licensed to any person by the State Board of Equalization of the State of California, the licensing agency, having charge of licensing such stills (California Constitution, Article XX, section 22); appellee does not now and has not at any time hold any license or permit of the said

State Board of Equalization, or of any other officer of the State of California, permitting him to possess said still; said still has been at all times located within the State of California (Tr., p. 22); the Alcoholic Beverage Control Act further provides that said still and other material forfeited to the State of California by virtue of such unlicensed possession (sections 51a, 51b, 51c, 51d and 52).

Appellants are, respectively, the State Liquor Administrator of the State of California and Chief Liquor Control Officer of the area of said state in which said still is and has been located, and are charged with the duty of seizing stills and other property forfeited to the State of California by virtue of said Act. Specifically, it is the duty of appellants to seize and take possession of said still pursuant to said Act, and to cause the commencement of an action in the appropriate courts of the State of California for the confirmation of said forfeiture; appellants, acting in their official capacities, sought to enforce said Alcoholic Beverage Control Act of the State of California with respect to said still in the possession and control of appellee (Tr., p. 45); the referee in said bankruptcy proceeding, on the 18th day of April, 1940, made his certain restraining order and order to show cause of that date, enjoining and restraining appellants and any and all persons acting for or with them from enforcing the Alcoholic Beverage Control Act with

respect to said still, said trustee and said estate (Tr., pp. 6-8), based upon appellee's petition for such order (Tr., pp. 2-6); thereafter appellants moved to dismiss the proceeding respecting said restraining order and order to show cause (Tr., p. 9), and on or about the 26th day of October, 1940, said referee made his order denying the motion to dismiss and continuing said restraining order in effect until the merits of the petition for said restraining order be determined (Tr., pp. 10-12); thereafter appellants filed their answer and petition for leave to enforce the Alcoholic Beverage Control Act with respect to said still and for the delivery of said still, for the purpose of commencing a forfeiture proceeding pursuant to the laws of the State of California (Tr., pp. 71-75); appellee answered said petition (Tr., pp. 76-78), and a hearing was had on the merits of said petitions and answers and a certain stipulation of facts and testimony offered (Tr., pp. 27-30).

The testimony was that appellee was of good character and reputation (Tr., p. 37), but had possessed, without a license, a similar still as a trustee in another bankruptcy proceeding, and appellants had demanded that he secure a license for such still (Tr., pp. 35-36); that he had not operated nor intended to operate either still, and that his attorney advised him that the state law did not require a license; that although he was an attorney he accepted this advice and made no application until

December 11, 1940, when he did apply for a license (Tr., pp. 36-37).

Following said hearing said referee made his order on said petitions (Tr., pp. 31-33), denying any relief to appellants and ordering that the prayer of the trustee's petition be granted and the temporary restraining order heretofore referred to be continued "until action is taken by the State Board of Equalization upon the application of the trustee for license" (Tr., pp. 79-81); thereafter appellants petitioned the District Court for a review of said proceedings and order of the referee, which review was allowed, and upon a hearing the order appealed from was made on November 22, 1941 (Tr., pp. 88-89).

The jurisdiction of this court to review the judgment of the United States District Court is based upon section 24 of the Bankruptcy Act, 11 U. S. C. A., sec. 47 as revised and amended by the Chandler Act of June 22, 1938, Judicial Code, sec. 65, (28 U. S. C. A., sec. 124); 48 Stat. 993, (28 U. S. C. A., sec. 124a); Judicial Code, section 128, (28 U. S. C. A., sec. 223); Judicial Code, section 129, (28 U. S. C. A., sec. 227), Notice of Appeal duly filed (Tr., pp. 90-91), Designation of the Portions of the Record, Proceedings and Evidence Contained in the Record on Appeal (Tr., pp. 93-95), and Order of Circuit Court of Appeals allowing appeal made and filed herein.

III

**PERTINENT CONSTITUTIONAL AND STATUTORY
PROVISIONS**

The Twenty-first Article of Amendment to the Constitution of the United States provides in part:

“The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.”

The People of the State of California, following the adoption of the foregoing Article of Amendment to the Constitution of the United States, adopted section 22 of Article XX of the Constitution of that state, reading in part:

“The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor. * * * The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this state * * * It shall be unlawful for any person other than a licensee of said board to manu-

facture, import or sell intoxicating liquors in this state * * *.”

Pursuant to the provisions of this amendment, the Legislature of the State of California adopted the Alcoholic Beverage Control Act (Statutes 1935, p. 1123, as amended by Statutes 1937, pp. 1934 and 2126; Deering’s General Laws, Act 3796), the pertinent provisions of which follow:

Section 1 of the Act provides in part:

“This act shall be deemed an exercise of the police powers of the State, for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages; and it is hereby declared that the subject matter of this act involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people; and all provisions of this act shall be liberally construed for the accomplishments of these purposes. * * *”

Section 2 of the Act provides in part:

“The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning: * * *

(f) ‘Person’ includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination

acting as a unit, and the plural as well as the singular number. * * *

(w) 'Within this State' means all territory within the boundaries of this State. * * *

(x) 'Still' means a still used in the production or capable of being used in the production of alcoholic beverages and does not include stills or apparatus used solely in the production of distilled water or substances other than alcoholic beverages. * * *

(z1) 'Licensee' means any person holding a license issued by the board. * * *"

Section 3 of said Act provides:

"No person shall exercise the privilege or perform any act or acts which a licensee under this act may exercise or perform under the authority of a license issued under this act unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act. Any person violating any provision of this section shall be guilty of a misdemeanor, except that any person exercising the privileges or performing any act or acts which a still licensee may exercise or perform without having a still license duly issued under this act to said person is guilty of a felony."

Section 5 of said Act provides in part:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor. * * *

4. Still license----\$10.00 per year per still."

Section 6 of said Act provides in part:

“Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued. * * *

(b) A still license authorizes the person to whom issued to own or possess the number of stills indicated in the license upon the premises for which issued * * *”

A still license does not permit the operation of the still. An additional license, as a brandy manufacturer's license or distilled spirits manufacturer's license, is required for such operation.

See section 5, subdivisions 6 and 7, and section 6, subdivision (a).

Section 51a of said Act reads:

“The board or its employees shall also have the power to seize any unlicensed still, whether in actual operation or not, and whether assembled for operation or dismantled, and also any parts of such stills, and also any materials or supplies capable of being used for the manufacture of alcoholic beverages which are found on or about the premises where any such unlicensed still or parts thereof are found.”

Section 51b of said Act reads:

“When alcoholic beverages or any other property are seized under the provisions of this act

such alcoholic beverages or other property shall be forfeited to the State and all such forfeitures are hereby declared to be statutory forfeitures.”

Sections 51d and 52 of the Act provide a detailed procedure for a judicial proceeding to confirm the Statutory forfeiture declared in the foregoing provisions of said Act.

Statutes of the United States bearing upon this question are section 124a, Title 28, U. S. C. A., reading:

“Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power of the State or States, or by the civil subdivisions of the State or States imposing the same.”

—and section 124, Title 28, U. S. C. A., reading:

“Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such

receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than \$3,000, or imprisoned not more than one year, or both.”

IV

QUESTIONS PRESENTED BY THE APPEAL

1. Has a referee in bankruptcy jurisdiction to restrain State law enforcement officers from enforcing a penal statute of the State with respect to a bankruptcy trustee and property in his possession as such trustee?

2. Has a referee in bankruptcy jurisdiction:

(a) To authorize a trustee in bankruptcy to disobey the state statutes in two respects, first, the nonpayment of taxes and license fees, and secondly, to refuse to comply with a valid police regulation of the state requiring a license in order to possess an alcoholic beverage still;

(b) To enjoin the commencement or the prosecution of criminal actions against the trustee for a violation of the state law;

(c) To protect the trustee in the continuing possession of contraband under the state law;

(d) To give injunctive relief against strangers to the proceeding upon an affidavit or so-called

petition and order to show cause without process in the bankruptcy proceeding?

3. Do the petition, order to show cause and stipulation on which the restraining orders were made by the referee in bankruptcy state a cause of action for (a) any relief, and (b) the particular relief granted by the referee?

4. Should such state enforcement officers be granted leave to confirm and enforce in the State courts a statutory forfeiture of property formerly belonging to the bankrupt and in the hands of such trustee?

V

STATEMENTS OF POINTS AND SPECIFICATIONS OF ERRORS RELIED UPON

1. The District Court and its said referee in bankruptcy erred in issuing said restraining orders and injunctions, and each of them, upon the subject-matter of the purported cause of action set forth in said petition of said trustee.

2. The District Court and its said referee erred in denying appellants' motion to dismiss this proceeding.

3. The District Court and its said referee, and each of them, erred in attempting to exercise jurisdiction over the persons of appellants in their respective official capacities.

4. The District Court and its said referee erred in denying leave to appellants to confirm and enforce the forfeiture incurred by appellee's unlawful possession of said alcoholic beverage still.

VI

ARGUMENT

A. Categorical

1. The State Law Controls Alcoholic Beverages and their Incidents

The essential question presented by this appeal is whether the statutes respecting alcoholic beverages adopted in the exercise of the police power of the State of California may be enforced against a trustee in bankruptcy and the assets of the bankrupt's estate in his possession otherwise subject to the state statutes.

It is the general rule that the state police power may be exercised with respect to matters subject to the jurisdiction of the United States. The state law in such case prevails.

Ashton v. Cameron County etc. District, 298

U. S. 513, 530, 531; 56 Sup. Ct. 892;

United States v. Butler, 297 U. S. 1; 56 Sup. Ct. 312;

Ziffirin, Inc. v. Reeves, 308 U. S. 132; 60 Sup. Ct. 163.

With respect to alcoholic beverages and their incidents, the power of the individual states to legislate and enforce legislation is unlimited. Such

statutes override the specific provisions of the Constitution of the United States.

State Board of Equalization v. Young's Market Co., 299 U. S. 59; 57 Sup. Ct. 77;

Ziffrin, Inc. v. Reeves, supra.

(Interstate commerce and the Fourteenth Amendment.)

Wiley v. State Board of Equalization, 21 Fed. Supp. 604.

(The privileges and immunities clause of Article IV, section 2.)

Such state statutes need not be reasonably necessary to control the liquor traffic in the state.

Mahoney v. Jos. Triner Corp., 304 U. S. 401; 58 Sup. Ct. 952.

See, also:

Premier-Pabst Sales Co. v. State Board of Equalization, 13 Fed. Supp. 90, 93-94.

2. Appellee should have been Required to Pay the License Fee

Pursuant to sections 2 and 5 of the Act, which we have set out *supra*, every “estate, trust * * * receiver” and other person is required to pay the ten dollar license fee for each still possessed. The fees required by this Act have been held to be taxes.

State Board of Equalization v. Young's Market Co., supra.

See, also:

In re Mid-America Company, 31 Fed. Supp. 601.

The officers of the Federal courts are required to pay such fees by the provisions of section 124a, Title 28, U. S. C. A., *supra*.

Boteler v. Ingels (9th Cir.), 307 U. S. 617;
59 Sup. Ct. 792;

Preble Corp. v. Wentworth, 84 Fed. (2nd) 73;
denied certiorari, 299 U. S. 575.

3. Appellee Should Have Been Required to Procure a Still License

It is not necessary to consider whether in any event the Federal courts may authorize their officers to violate state laws enacted in the exercise of state police power, because it has been held that Congress expressly withheld any such power from the courts of the United States by the passage of section 124, Title 28, U. S. C. A.

Gillis v. California, 293 U. S. 62; 55 Sup. Ct. 4.

See, also:

Boteler v. Ingels, supra;

In re Mid-America Company, supra.

Appellee was required to procure a license in order to possess the distilling equipment received from the bankrupt.

4. The Still Has Been Forfeited to the State

Upon the refusal of appellee to promptly register the instant still and procure a license permitting him to possess the same, the still became (if it had not already become) forfeit to the State of California by operation of law.

Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377; 220 Pac. 306;
Niccoli v. McClelland, 21 Cal. App. (2d) 759; 65 Pac. (2d) 853;
People v. One 1933 Plymouth, 13 Cal. (2d) 565; 90 Pac. (2d) 799;
United States v. Stowell, 133 U. S. 1; 10 Sup. Ct. 244.

The mere fact that appellee was a trustee in a bankruptcy proceeding does not require a different rule. The rights of a trustee in bankruptcy with respect to alcoholic beverages and equipment for their manufacture are governed by the state law.

See cases cited *supra* and

In re Manhattan Hofbrau Haus, 19 Fed. Supp. 896;
In re Bay Ridge Inn, 94 Fed. (2d) 555, at 556-7;
Swarts v. Hammer, 194 U. S. 441, 444; 24. Sup. Ct. 695.

The same rule applies to other businesses subject to regulation.

Mitchell v. Lay, 48 Fed. (2d) 79 (9th Cir.); certiorari denied, 283 U. S.. 864.

5. The Still was Forfeited to the State before the Declaration of Bankruptcy

As clearly appears from the statement of facts, the bankrupt's license to possess the instant still terminated on the 30th day of June, 1939, and the bankrupt failed to renew his license or to procure another license to permit the possession of his dis-

tillery equipment. It was not until the 12th day of August, 1939 that the bankrupt filed a debtor's petition under section 322 of the Bankruptcy Act, and he was not adjudicated a bankrupt until the 18th day of November, 1939. Consequently, the still was unlawfully possessed by the bankrupt before the bankruptcy courts acquired jurisdiction of either the bankrupt or his estate, and was thereby forfeited to the state.

See cases cited *supra*.

Upon his unlicensed possession the still forfeited to the state and should have been delivered to the state for the purposes of confirming such forfeiture.

B. The Injunction Should Not Have Been Granted

The courts of the United States should not enjoin the commencement and prosecution of criminal proceedings in the state courts for violations of the penal statutes of the state.

The Antelope, 10 Wheat. 66, 68; 6 L. Ed. 268;

Terrace v. Thompson, 263 U. S. 197, 214; 44 Sup. Ct. 15;

Fitz v. McGhee, 172 U. S. 516; 19 Sup. Ct. 269;

Moss & Co. v. McCarthy, 191 Fed. 202;

Wallace v. Ford, 21 Fed. Supp. 624.

One of the principal reasons for denying injunctive relief in such cases is that the person seeking the injunction has an adequate remedy at law.

Speilman etc. Co. v. Dodge, 295 U. S. 89, 95; 55 Sup. Ct. 678.

In this case the trustee should have been required to comply with the state law or to establish that it did not apply to him in a criminal proceeding in the state courts, and it was error on the part of the referee and the court to enjoin the appellants, as persons charged with the enforcement of the state law, from performing their constitutional and statutory duties.

Speilman etc. Co. v. Dodge, Supra.

The court erred also in enjoining the enforcement of the Act with respect to the still and other property forfeited to the state.

See:

Texas v. Donoghue, 302 U. S. 284; 58 Sup. Ct. 192;

Mitchell v. Lay, *supra*;

Ziffrin, Inc. v. Reeves, *supra*.

C. Leave to Enforce the Forfeiture Should Have Been Granted

The contraband distillery equipment in this case had forfeited to the State of California because of its unlawful possession by the bankrupt and, subsequently, by the trustee (appellee), prior to the time appellants requested leave of the referee in bankruptcy to proceed to a confirmation of said forfeiture. The referee and the court erred in denying appellants' petition.

This was the holding in the case of *Texas v. Donoghue*, *supra*, where the same issue was pre-

sented in the case of contraband oil produced and transported in violation of the state statute. Since the question presented is identical, we take the liberty of quoting from the opinion (pp. 286, 288, 289):

“There is before us no question as to the validity of the State’s measures to regulate production, or as to when, if ever, the oil in controversy became forfeit. The sole issue is whether the bankruptcy court should have permitted the State to bring suit in a state court to have the oil adjudged confiscate. * * *

The State’s insistence is not that it is presently entitled to establish a right to forfeit the oil, but that the oil became its property when produced or transported contrary to law. It seeks not to forfeit but to enforce the forfeiture that resulted, as it maintains, immediately from unlawful production or transportation. * * *

The filing of the petition for reorganization in the bankruptcy court may not be held to deprive the State of opportunity in its own court to establish its claim that through forfeiture it had already become the owner of the oil for that would be to take the State’s property for the benefit of the offending company or its creditors. Nor may the receivers’ voluntary surrender of possession to the debtor’s trustee prevent adjudication of the State’s claim. The bankruptcy court abused its discretion in denying the State’s application for permission to institute proceedings in the state court and, to the extent that the Circuit Court of Appeals sustained that ruling, its judgment must be *Reversed*.”

CONCLUSION

The proceedings herein, the orders of the referee and the order of the court affirming these orders as modified violate every principle of law and policy of this nation, and completely deny to the state, through appellant officers, its right to enforce its policy and law with respect to a subject universally recognized as calling for strict regulation. It is obviously the purpose of the statutes of the state to require the registration and licensing of every distilled spirits still in the state.

The statute makes it clear that the purpose of its provisions respecting distilled spirits stills and equipment is to authorize possession alone. An additional license is required before the stills may be used and operated.

If stills may be readily possessed by anyone under any circumstances without registration and license, then it will be difficult if not impossible to adequately enforce the state law.

We respectfully submit that it is obvious that the policy of this state does not contravene any policy or law of the United States, and that the appellee in this case was subject to the provisions of the Alcoholic Beverage Control Act of the State of California.

Appellee should not have been protected in his refusal to comply with the state law by the improper injunction and restraining order issued by the referee and subsequently affirmed by the court.

Furthermore, the court should have permitted the enforcement of the forfeiture which had occurred by reason of appellee's failure and refusal to comply with the state law.

We respectfully submit that the judgment of the court should be reversed, with directions to the court below to grant leave to appellants to proceed as they may be advised in the enforcement of the penal and forfeiture provisions of the Alcoholic Beverage Control Act of the State of California.

Respectfully submitted,

DATED: April 30, 1942

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No. 10,068

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE M. STOUT, State Liquor Administrator of the State of California,
and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

Appellants,

VS.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

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FILED

MAY 29 1942

PAUL P. O'BRIEN,

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BRIEF FOR APPELLEE.

I.

STATEMENT AS TO JURISDICTION.

This is an appeal from an order of the District Court of the United States for the Southern District of California, Northern Division, affirming, as amended by the Judge of the District Court, an order of the Referee in Bankruptcy for the Southern District of California, Northern Division, residing at Fresno, California, enjoining certain officers of the California

State Board of Equalization from enforcing the provisions of the Alcoholic Beverage Control Act against Appellee herein. (Tr. pp. 88-89.)

District Courts of the United States and their referees in bankruptcy have general jurisdiction over matters in bankruptcy. (Section 2 of the Bankruptcy Laws of the United States as amended by Act of June 22, 1938; Section 11, Title 11, *U. S. C. A.*)

District Courts of the United States have original jurisdiction over appeals from orders of referees in bankruptcy. (Section 39c, Bankruptcy Laws of the United States as amended by Act of June 22, 1938; Section 67, Subdivision c thereof, Title 11 *U. S. C. A.*)

Circuit Courts of Appeals have jurisdiction over appeals in bankruptcy matters from District Courts of the United States. (Section 24 of the Bankruptcy Laws of the United States as amended by Act of June 22, 1938; Section 47, Title 11, *U. S. C. A.*)

Appellee's petition for a restraining order and order to show cause initiated this proceeding and the subsequent order from which this appeal is taken, was based upon said petition and Appellants' answer thereto. (See Tr. pp. 2 to 6 for the said Petition for a Restraining Order and Order to Show Cause. See Tr. pp. 71 to 75 for Appellants' Answer thereto.)

II.

STATEMENT OF THE CASE.

On August 12, 1939, George Hugo Malter filed a debtor's petition under the provisions of Chapter XI of the Bankruptcy Laws of the United States (Tr. pp. 68, 32), and was declared a bankrupt upon November 18, 1939, at which time Bert M. Green, Appellee herein, was appointed trustee for the said bankrupt estate. (Tr. p. 69.)

Among the assets of the bankrupt was a dismantled still (Tr. pp. 69, 32), which had been owned and possessed by the bankrupt, pursuant to a license issued by the State of California under the provisions of the California Alcoholic Beverage Control Act. The annual license fee for possessing said still was \$10.00. The bankrupt had not paid his renewal license fee of \$10.00 to the State of California when the same had become due on June 30, 1939, just prior to his bankruptcy. (Tr. pp. 68, 32.) The said trustee in bankruptcy, *Appellee herein, never operated the business of the bankrupt, never had permission from the Court so to do, and did not operate the said still in question at any time during his administration*; said Trustee at all times was acting only as liquidating officer of the Court, and was only engaged in the sale of the bankrupt's assets for the benefit of creditors. (Tr. pp. 69, 44 and 45, 32.) This point is determinative of many of the issues herein and should be most carefully considered.

Upon Appellee herein taking office the Appellants herein demanded that Appellee pay a \$10.00 license

fee for his possession of the said still. (Tr. p. 70.) Appellee refused to pay said license fee, first, because he was advised that the law did not require this payment, and, secondly, because he had no funds for the payment of administration expenses in this bankrupt estate. In fact Appellee had no money whatsoever on hand. (Tr. pp. 32, 35.) Thereupon, after threats made by Appellants to seize the said still and prosecute the said trustee, the trustee procured an injunction from the referee in bankruptcy, which was later affirmed as amended by the district judge, restraining and enjoining Appellants from taking any steps to enforce the Alcoholic Beverage Control Act against the said Trustee, and the bankrupt estate excepting the presentation of claims in the bankrupt estate for the payment of said license fee. (Tr. pp. 88 and 89.)

The trustee after fees came into his hands did apply for a still license and tender the license fee, although he was still of the opinion that the law did not require him so to do. This application was made so as to avoid extensive litigation over a matter involving such a small amount of money. (Tr. pp. 36 and 37.) The State Board of Equalization of the State of California has failed to act on Appellee's application for a still license. (Tr. p. 36.)

After the referee made his order of restraint, Appellants took a writ of review to the District Court and the referee's injunction was affirmed in the District Court as modified therein. (Tr. pp. 88 and 89.) This order of the District Court was entered on November 22, 1941. From the order of the District Court Appellants have prosecuted this appeal.

III.

QUESTIONS PRESENTED ON APPEAL.

(1) Is a trustee in bankruptcy required to comply with the provisions of the Alcoholic Beverage Control Act of the State of California, concerning the licensing of a still taken into his possession as an asset of a bankrupt estate?

(2) Assuming, but not admitting, that the trustee is subject to said licensing provisions, at what period in the administration of said estate is he required to pay the license fee called for in the said statute?

(3) Is the still in question forfeited to the State of California (a) either by reason of delinquency in payment of tax by the bankrupt; (b) or by reason of delinquency in payment of taxes by the trustee?

(4) Must the United States by reason of its claim of lien upon the still in question be a party to any proceeding in the Bankruptcy Court looking to the forfeiture of its still to the State of California?

(5) Has a referee in bankruptcy power to determine the validity and effect of taxes claimed by the State from a trustee in bankruptcy under the provisions of the California Alcoholic Beverage Control Act, and the power to protect a trustee in bankruptcy and the bankrupt estate by an injunction directed against the State officers charged with enforcing the provisions of the Alcoholic Beverage Control Act?

IV.

ARGUMENT OF THE CASE.

A.

APPELLEES' ARGUMENT.

- (1) A TRUSTEE IN BANKRUPTCY NOT OPERATING A BUSINESS, IS NOT SUBJECT TO THE LICENSING PROVISIONS OF THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT.

It is elementary that some statute must exist, either State or Federal, that would require a trustee in bankruptcy to pay the tax levied by the Alcoholic Beverage Control Act upon the possessor of a still. Failing such statutory requirement the trustee, of course, would not fall within the provisions of the Alcoholic Beverage Control Act in the exercise of his duties as a liquidating officer of the Bankruptcy Court.

The Alcoholic Beverage Control Act of the State of California (Statutes 1935, p. 1123, as amended by Statutes 1937, pp. 1934 and 2126; Deering's General Laws, Act 3796) requires each person possessing a still to pay a \$10.00 tax yearly for the possession of such still. The said Act in Section 2, subdivision F thereof, describes a person as follows:

“ ‘Person’ includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number.”

It will be noted that a trustee in bankruptcy is not specifically mentioned in the definition of “person”.

A trustee in bankruptcy being an officer of the Court, and, therefore, identical with the sovereign power of the United States, the rule is that he is not included within the contemplation of the statute unless the statute specifically refers to a trustee in bankruptcy. In this connection I quote from *Associated Brewer Distributing Co. v. Riley*, 39 Cal. App. (2d) 235, at page 238, 102 Pac. Rep. (2d) 781:

“The established rule is, however, that a sovereign power, in this case the Federal Government, shall not be deemed to be included within the general language of a statute—that unless special words are used indicating a contrary intent, it must be presumed that the statute was not designed to operate against the Government.”

In the case now before the Court the trustee in bankruptcy is part of the sovereignty of the United States, being an officer of the United States. The trustee's possession of the still was the court's possession. Therefore, this still was in the possession of the sovereignty. *In re California Pea Products, Inc.*, 37 F. Supp. 658, at page 661, holds as follows:

“The possession of the property by the trustee is the court's possession and any act interfering with the court's power of control and disposal and done without the court's sanction is void. *Dayton v. Stanard*, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190.”

See also *Gagne, Collector of Internal Revenue v. Brush*; *In re Cullen Hardware Corporation*, 30 F. Supp. 714, at page 716, which holds:

“I hold that a trustee in bankruptcy is an instrumentality of the United States * * *”

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734,
51 Sup. Ct. 270;

In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785.

There being nothing expressly within the State statute requiring a trustee in bankruptcy to pay the still license tax, we then turn to the Federal statutes in an endeavor to ascertain whether or not there is anything in said statutes requiring a trustee in bankruptcy to pay such tax. The Appellants have cited Sections 124 and 124a of Title 28, *U. S. C. A.*, as their authority that this trustee was required to pay this tax.

U. S. C. A., Section 124, Title 28.

“Management of property by receivers. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than \$3,000, or imprisoned not more than one year, or both.”

U. S. C. A., Section 124a, Title 28.

“State taxation; business conducted by receivers, trustees, or other court officers subject to.

Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United

States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, that nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same.”

These sections apply only to trustees or receivers who are operating a business. There is no dispute of the fact that this trustee was not operating either the still or any business.

Therefore, under the authority of *In re California Pea Products, Inc.* (supra), it is clear that the Federal statutes do not require a trustee to pay this tax. I quote from page 661 of said case:

“The record shows that the trustee was not authorized by the bankruptcy court to conduct business under the permissive provisions of the bankruptcy act. Section 2, sub. a (5), 11 U.S.C.A. Section 11, sub. a (5) in fact, no application of any kind was made to carry on or to conduct business. On the contrary, all of the selling activities of the trustee in bankruptcy were purely liquidating functions and in no proper sense should be considered in any other category. This factual

difference distinguishes such cases as *City of Springfield v. Hotel Charles*, 1 Cir., 84 F. 2d 589, and *In re: Chas. Nelson Co.*, D.C., 27 F. Supp. 673. It also illustrates the inapplicability of Section 124a of Title 28, U.S.C.A. to the transactions of the trustee in bankruptcy under consideration.”

Under the above authorities it is respectfully contended that a trustee in bankruptcy is not subject to the payment of this tax during the administration of the estate.

(2) THE TAX OWING TO THE STATE OF CALIFORNIA, IF ANY, IS NOT YET DUE OR PAYABLE.

Assuming for the purposes of argument that the trustee is required to pay this tax the question then arises as to when the tax becomes due. Counsel for the State contends that immediately upon the acquisition of the still the license fee became due and the trustee was thereupon required to pay the same, and failing to do so the still became forfeited to the State. It is elementary that the still would not forfeit until such time as the license tax became due and payable and was not paid. If, therefore, the tax did not become payable until such time as the trustee rendered his account of his administration and was authorized to pay this tax by the referee, then the still would not forfeit until such time as this order was made and the trustee refused to comply with it. If the State wished an earlier payment of the tax it was their duty to file a claim or demand therefor, or start a proper proceeding in the Bankruptcy Court to procure an order of the referee ordering and authorizing the trustee to pay this tax.

It is conceded by all concerned that the tax on the trustee's possession of said still would have been an administrative expense only. It is further conceded that at the time that the first request for payment was made there were no funds in the hands of the trustee for the payment of the same. As a matter of fact there has never been any determination by the trustee or by any court proceedings that there would be at any time sufficient funds to pay all expenses of administration in full. The Bankruptcy Act (*supra*), Section 64 thereof establishes the priority of payment of claims and demands upon a bankrupt estate, and subdivision 1 of subdivision (a) thereof establishes as first priority the expenses of administration.

Subdivision 1 of subdivision (a) of Section 64 of the Bankruptcy Laws of the United States, as amended by Act of June 22, 1938, lists the following as having first priority in payment:

“The actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional

services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow.”

U. S. C. A., Section 104, Title 11.

All expenses of administration are on a par one with the other, and there is no suborder of priority established by said subdivision 1. In the event the trustee pays any expenses of administration prior to the payment of all expenses of administration the trustee runs the risk of being surcharged in the event, at the close of the estate, he does not have sufficient funds to pay all expenses of administration in full. Therefore, it is only reasonable that he would not be required to pay this expense of administration, or any other until such time as an adjudication of the referee determined that there were sufficient moneys on hand to pay all expenses of administration. It follows in this case that he could not have been required to pay this tax at the time that there were no funds on hand, and since the tax was not due at the time demand was made no forfeiture could ever have taken place. Two cases in which a trustee was surcharged for paying some expenses of administration in full prior to the payment of other expenses of administration are *In re Lambertville Rubber Co.*, 111 Fed. (2d) 45, and *In re Englander*, 39 Fed. (2d) 931. In *In re Lambertville Rubber Co.* (supra) the trustee had paid certain taxes in full, and upon his final accounting found that he did not have sufficient funds to pay the expenses of ad-

ministration in full. At page 50 of said case the Court held as follows:

“We conclude that the trustee acted negligently in paying the taxes referred to in this opinion. He must therefore be surcharged.”

I further quote from page 48 of said case as follows:

“The trustee is charged with an intimate knowledge of the estate which he is administering and if he pays claims out of time and without the protection of an order of the court affirmatively authorizing such conduct, he must be certain that such payments will work no harm to any creditor. Under such circumstances he acts at his own risk and if his judgment is bad, he must accept the consequences.”

The trustee in this particular case knew that there were no funds on hand and that the assets of the debtor were encumbered with a great many liens. Therefore, it was not at all probable that there would be sufficient moneys to pay all expenses of administration. The trustee's judgment, therefore, did not permit him to pay this tax until some funds were received, and it is inescapable therefore that the tax was not due until such time as the trustee's judgment told him that there would be sufficient moneys to pay the taxes and the Court so ordered. I quote from *In re Englander* (supra), from page 932 of said case as follows:

“The receiver received the bankrupt estate as a trust fund, and it would be inequitable if he could prefer one or more creditors of the administration over others of equal rank and pay them in full to the detriment of the others. * * * It is therefore

necessary to make a pro rata application of the gross amount of the estate to all the expenses of the receivership, although this may result in the receiver being the loser of whatever he has paid any of his administration creditors in excess of what they have received in a pro rata distribution.”

It is conceded by Appellants that this expense of administration is a tax. I refer the Court to page 15 of the brief filed herein by Appellants, and for the cases cited therein on the proposition that this exaction is a tax. *In re Mid America Co.*, 31 Fed. Supp. 601, recites as follows:

“The word ‘tax’ as used in Section 64, subdivision (a) (4) quoted above is not to be construed in a limited sense, but must be interpreted to include all types of involuntary exactions, regardless of name, levied by the Federal and State Governments for governmental or public purposes.”

The Bankruptcy Court has exclusive jurisdiction to determine the validity, priority in payment, and the time of payment of taxes claimed against bankrupt estates and trustees in bankruptcy. Subdivision 4 of subdivision (a) of Section 64 of the Bankruptcy Act (*supra*), reads as follows:

“Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: And provided further, That, in case any question arises as to the amount

or legality of any taxes, such question shall be heard and determined by the court.”

In view of the above it is respectfully submitted that no forfeiture has taken place in view of the fact that this expense of administration is not due, first, until the Bankruptcy Court has determined that this claim is a valid charge against the bankrupt estate, and second, until some action has been taken to determine that there is sufficient money to pay all expenses of administration, and the trustee is authorized to pay this tax together with other expenses of administration.

(3) THE STILL WAS NOT FORFEITED TO THE STATE AT THE TIME THE TRUSTEE TOOK POSSESSION OF THE SAME, NOR THEREAFTER.

Appellants, after once demanding that Appellee procure a still license for the still in question, now contend that the said still was contraband and forfeited to the State of California at the time they proposed to license the same Appellee. The lack of *bona fides* of Appellants in this untimely contention should be apparent to the Court.

It must be conceded that statutes providing for forfeiture must be strictly construed against the party asking for forfeiture. See 12 *California Jurisprudence*, at page 633, being Section 3 on Forfeiture.

“Forfeitures are never favored by courts of law or equity, and are never enforced if they are couched in ambiguous terms.”

See also cases cited in said section as to the strict construction to be placed on forfeiture statutes.

The statute under which the forfeiture is claimed is Section 4 of the Alcoholic Beverage Control Act (supra), the last portion of which, dealing with forfeiture, reads as follows:

“The board may seize and summarily destroy any still which is not registered or for which a license has not been obtained as required by this act.”

It is conceded that this still was registered by the bankrupt and it is further conceded that a license had been obtained by the bankrupt for this still, the only point that the Appellants make being that although the still had been registered and a license had been obtained, the renewal fee for said yearly licensing had not been paid.

Section 8 of the Alcoholic Beverage Control Act (supra) covers the penalties prescribed for failing to renew licenses which have become delinquent. I quote from the last paragraph of said section, which establishes the said penalty for failing to renew licenses:

“For failure to reapply for a license prior to the time when any license expires, the board may by regulation prescribe that in addition to the license fees specified in section 5 hereof a penalty of not to exceed twenty-five per cent of such fees must be paid.”

Section 5 of the Alcoholic Beverage Control Act (supra), subdivision 5 thereof, requires the payment of \$10.00 per year for a still license.

Therefore, it would seem under the strict construction of the above Act that since the still in question

had been licensed by the bankrupt, and the bankrupt was only delinquent in the payment of the yearly license fee, that the only penalty which could be enforced against said bankrupt, or his successor in interest, the trustee, would be the collection of a twenty-five per cent penalty for the failing to pay said tax. In a bankruptcy proceeding in order to collect this tax the State would have had to file a claim in the proceedings for the payment of this tax and the penalty prescribed by the statute would not be collectible in the bankruptcy proceedings. No claim has been filed by the State and the time for filing claims has expired.

The Appellants contend that the still was forfeited at the time the trustee took possession because of the non-payment of this debt to the State by the bankrupt. They claim that the penalty for this non-payment was the forfeiture of the still. The Bankruptcy Laws of the United States (*supra*) prohibit said forfeiture. I quote from Section 57J of the Bankruptcy Act (Section 93J, Title 11, *U. S. C. A.*):

“Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.”

This section applies to many penalties which are placed upon individuals for late payment of taxes. In

the instant case, however, the penalty is a forfeiture and as such is prohibited by the above section.

Appellants have claimed that the trustee took no title to this still by virtue of the fact that it was forfeited and was, therefore, contraband, and not property at the time the trustee took possession of the assets of the bankrupt. Even though, the State had the right to enforce the forfeiture at the time the trustee took possession, the State's rights were not perfected, and the bankrupt still had the title to the still and that title did pass to the trustee. I quote from *People v. Broad*, 216 Cal. 1, 12 Pac. Rep. (2d) 941:

“Even where, as here, the Statute declares that a forfeiture takes place at the time of the commission of the offense, such forfeiture is not fully and completely operative and effective, and the title of the State is not perfected until there has been a judicial determination.”

The above case is one in which the State was endeavoring to forfeit an automobile which had been used for the transportation of narcotics. See also *Leman v. L. A. T. Ry. Co.*, 38 Cal. App. (2d) 659, at page 673, 102 Pac. Rep. (2d) 387.

Therefore, it would appear that the trustee did take title to the property, and since he did take title under Section 57J of the Bankruptcy Act (supra) no forfeiture could then be effective as to the trustee.

(4) CONFLICTING CLAIMS TO THIS STILL MAY ONLY BE DETERMINED IN THE BANKRUPTCY COURT.

The evidence and the records in the bankruptcy proceedings disclose that the United States of

America claims a lien upon the still in question. Therefore, were the trustee to permit the State to take the still in question without an adjudication as to the rights of the United States the trustee might be subject to make payment of the claim of the United States out of other funds. The law requires all conflicting claims, or interests in property in a bankruptcy to be determined in the Bankruptcy Courts and the Bankruptcy Court may not divorce itself of the jurisdiction so to do. This is true, of course, only where possession of the property has come into the Bankruptcy Court. In this case the trustee has had possession of the still at all times as shown in the Referee's certificate. See *Remington on Bankruptcy*, Section 2472, which reads as follows:

“Liens upon property in the custody of the bankruptcy court, and interests in such property, may be marshaled and their validity and priority determined by the bankruptcy court, in the bankruptcy proceedings.”

See also *Remington on Bankruptcy*, Section 2804, governing the determination of tax questions relating to bankruptcy property, which reads as follows:

“But the Bankruptcy Court is the forum for the determination of the amount and legality of the tax and all questions in relation thereto.”

See also *Remington on Bankruptcy*, Section 2478, regarding the Referee's jurisdiction to marshal liens against the property of the bankrupt. In that connection see *In re Rochford*, 124 Fed. 182, which reads as follows:

“A referee in bankruptcy has jurisdiction to draw to himself by summary process or notice, and in the first instance to determine the question of the validity of the claim of a third party to a lien upon it, or an interest in, property or the proceeds of property lawfully in the custody of a trustee in bankruptcy.”

See:

In re Florence Commercial Co., 19 Fed. (2d) 468;

Mound Mines Co. v. Hawthorne, 173 Fed. 882.

Mound Mines Co. v. Hawthorne, 173 Fed. 882, at page 885, holds that the Referee may require all third party claims to property to be tried in the Bankruptcy Court, when the trustee in bankruptcy has the possession of the same.

It seems obvious from the above citations that all conflicting claims to property in the possession of a trustee in bankruptcy must be brought before the Bankruptcy Court. The claims in question are tax claims and the liens arising from tax claims must be determined in the Bankruptcy Court. The State, therefore, has a simple remedy to have this matter adjudicated by bringing a petition to marshal liens against this still. It wishes to determine the priority of its claim for forfeiture by reason of this unpaid tax as to the claim of the United States which arises from unpaid taxes. Had that proceeding been brought the Referee would then have jurisdiction to determine whether or not the State actually had the forfeiture it claims, and if so whether or not said forfeiture right was prior to the rights of the United States.

The Appellant apparently wishes to have the right granted it by the Bankruptcy Court to take the question of the forfeiture to the State Courts, and is endeavoring to have the Bankruptcy Court give it that right without giving other parties interested in the still notice of the proceedings in the Bankruptcy Court. The Forfeiture Statute would be invalid if it permitted such proceeding. Adequate notice to persons interested in bankruptcy proceedings is required as a matter of due process. See *People v. Broad* (supra), at page 9 thereof, which reads as follows:

“But in this jurisdiction the cases have established the rule that to constitute due process the statute must itself provide for notice; and consequently we must hold the portion of the act which purports to authorize forfeitures without notice to the owner to be invalid.”

The “owner” in the *People v. Broad* (supra) case was the holder of a conditional sales contract on the automobile which the State was endeavoring to forfeit. The finance company, therefore, was actually only a lien claimant, and the rule would seem to be that all claims of an interest in property to be forfeited must have notice of any proceedings looking thereto.

**(5) THE REFEREE IN BANKRUPTCY HAD THE INJUNCTIVE
POWER EXERCISED IN THE PREMISES.**

Referees in Bankruptcy have general injunctive powers to protect the assets of bankrupt estates administered in their Courts.

In re California Pea Products, Inc. (supra);

Dayton v. Stanard, 241 U. S. 588, 36 Sup. Ct. 695;

Isaacs v. Hobbs Tie & Timber Co. (supra).

The fact that those enjoined are the State officers charged with enforcing the particular act involved does not remove the Court's power to prevent them from interfering with the bankrupt estate by an unauthorized and unlawful exercise of their alleged powers.

Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269;
In re Tyler (supra).

B.

DISCUSSION OF APPELLANTS' ARGUMENT AND CASES CITED THEREIN.

Many of the cases cited by Appellants are apparently cited for the purpose of establishing that the State has the power to supervise the manufacture and sale of intoxicating liquors, and Appellee does not dispute this, but does maintain that the Bankruptcy Court has the sole power in a bankruptcy proceeding to determine the validity, amount and time of payment of any taxes levied by the State under its said powers.

Subdivision (4) of Subdivision (a) of Section 64 of the Bankruptcy Laws of the United States (supra);

State of New York v. Jersawit, 263 U. S. 493, 44 Sup. Ct. 167;

State of California v. Moore, 88 Fed. (2d) 564;
In re Brown, 41 Fed. (2d) 228.

All of their remaining cases cited by Appellants, which have to do with the payment of State taxes by trustees in bankruptcy deal with cases where the trustee is *operating a business*, and thus is required to pay the tax under the provisions of 124(a) of Title 28, *U. S. C. A.* There is no operation of a business here, and those cases cited are completely worthless in determining the issue now before the Court, said cases cited being as follows:

Boteler v. Ingels, 100 Fed. (2d) 915 (in which said case the United States Supreme Court has granted certiorari, 307 U. S. 617, 59 Sup. Ct. 792);

Gillis v. State of California, 293 U. S. 62, 55 Sup. Ct. 4.

Appellants seems to place considerable reliance on *Texas v. Donaghue*, 302 U. S. 284, 58 Sup. Ct. 192.

That case is not in point here. In that case a trustee took over some oil that was produced in contravention of the Conservation Statutes of Texas. That statute declared the said oil to be contraband at production. In our case the still was a licensed still with a delinquent renewal payment. In the *Texas v. Donaghue* (supra) case, the Court held the Bankruptcy Court had no power to determine whether or not the oil was forfeited, as that was a matter for the State Courts. But in that case they were not dealing with taxes. Here we are dealing with a tax and the

Bankruptcy Laws of the United States specifically vest in the Bankruptcy Courts the sole jurisdiction to determine the validity and amount of taxes claimed against bankruptcy estates, thus removing that power from the State Court.

Subdivision 4 of Subdivision (a) of Section 64 of the Bankruptcy Laws of the United States (*supra*).

V.

CONCLUSION.

It is unfortunate that the two sovereignties, State and Federal, find themselves at odds in the matter before the Court. The Appellants apparently feel that its supervision is required over the Federal Courts in their administration of bankruptcy estates in order to safeguard the citizens of the State of California from some imaginary evils that might arise from the bankruptcy administration.

The Congress of the United States has seen fit to require trustees in bankruptcy to cooperate with the state, and abide by their regulations when the said trustees are carrying on a business within a state. However, Congress has had sufficient confidence in its Courts to omit the requirement of compliance with state regulatory statutes where the Federal Courts are merely liquidating agencies.

The State of California has not seen fit to impose its regulations specifically on liquidating trustees in

bankruptcy, and the Courts of the State of California have heretofore recognized this exception to such regulatory and taxing statutes. Thus since neither State nor Federal statutes require the payment by the Appellee of the tax claimed by Appellants it is respectfully urged that this unfortunate dispute should be decided in favor of the Federal sovereignty, the Appellee.

Assuming for the moment, but not admitting, the Appellee is liable for this tax, nevertheless, the payment of the tax, if any, is not due, since the tax is only an expense of administration in this bankruptcy proceeding. Naturally no forfeiture can take place for non-payment of a tax that is not due. The still passed to trustee prior to any forfeiture by the State, and the State at that time merely had a claim against the bankruptcy estate for an unpaid tax owing by the bankrupt at the time of his adjudication. The Appellants cannot now, with good grace, cry "forfeiture" after their conduct in conceding no forfeiture when they asked the trustee to pay the tax on this still and to procure a license to possess the same.

The order of the District Court is correct in protecting the bankrupt estate from unlawful interference by Appellants. Appellants should have filed their claim for the tax due by the bankrupt, and at the closing of the estate it would have been paid. Appellants are not entitled to be paid this license tax on the trustee's possession.

I respectfully submit that this Court should hold that the trustee is not subject to the payment of this tax, and that the injunction heretofore issued should be a permanent and final injunction enjoining the Appellants from taking any steps to enforce any said payment from the trustee.

Dated, Fresno, California,
May 29, 1942.

Respectfully submitted,

FRANK C. LERRIGO,
Attorney for Appellee.

No. 10,068

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE M. STOUT, State Liquor Administrator of the State of California,
and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

Appellants,

vs.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

FILED

JUN 9 - 1942

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No. 10,068

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE M. STOUT, State Liquor Administrator of the State of California,
and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

Appellants,

VS.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

INTRODUCTION.

We are in receipt of brief for appellee, and respectfully submit this reply. We detect no disagreement as to the facts of the case as stated in our opening brief. However, in his statements as to jurisdiction and of the case, contained on pages 1 through 4 of appellee's brief, there are certain argumentative matters to which we do not accede. Such of these argumentative statements as have any bearing on the case will be discussed in considering appellee's argument.

Appellee sets forth on page 5 of his brief a statement of the questions presented on appeal. We submit that his questions numbered (1) and (3) are presented, but that the remainder of appellee's statement has no bearing upon the instant proceeding.

APPELLEE'S ARGUMENT CONSIDERED.

1. THE CONTENTION THAT ONLY OPERATION, RATHER THAN MERE POSSESSION, REQUIRED A LICENSE.

Appellee devotes pages 6 through 10 to his contention that a trustee in bankruptcy is not required to comply with state law unless he operates a business. It is stated that a trustee in bankruptcy is not included within the definition of "person" as defined for the purposes of the California Alcoholic Beverage Control Act (Statutes 1935, page 1123, as amended by Statutes 1937, pages 1934 and 2126; Deering's General Laws, Act 3796) because "a trustee in bankruptcy is not specifically mentioned in the definition * * *"

The definition includes "estate", "trust" and "receiver", and we submit that the Act applies to a trustee in bankruptcy, or an estate in bankruptcy, or a receiver appointed by a bankruptcy court to the same extent as it would apply to the assets of a decedent, a trustee under a testamentary trust, or a receiver appointed in a court of equity of either the state or the United States.

It is contended on page 7 that a trustee in bankruptcy, being an officer of the bankruptcy court, is "identical with the sovereign power of the United

States * * *'' The authority cited is the case of *Associated etc. Co. v. Riley*, 39 Cal. App. (2d) 235.

That case dealt with a state alcoholic beverage tax act, but has nothing else in common with the instant proceeding. In that case the United States seized and sold liquor for unpaid customs duties, and it was contended that the United States was first in possession and should have paid the tax imposed by sections 1 and 5 of the California Beverage Tax Act of 1933 (Statutes 1933, page 625), being the person "first in possession" of a beverage "within the state after completion of the act of importation."

It was held by the court that the United States, in seizing and selling the liquor for unpaid customs duties, was engaged in a purely governmental function and therefore not subject to the taxing statute.

No other authority is cited for the proposition that a trustee in bankruptcy taking possession or holding title to property of a bankruptcy estate is acting for the United States.

The case of *In re Pea Products Inc.*, 37 Fed. Supp. 658, is quoted. Analysis of this decision discloses that the issue there was whether a trustee in bankruptcy was required to procure a permit to sell tangible personal property pursuant to the California Retail Sales Tax Act before making a single sale of the physical assets of the bankrupt. The statute in that case applied only to "retailers" and a retailer was therein defined as "* * * every person engaged in the business of making sales at retail or in the business of making

retail sales at auction of tangible personal property owned by such person or others * * *'' (Secs. 3 and 2(e), Sales Tax Act, Statutes 1933, page 2599.) The taxable act or functional element of that statute was *engaging in business*. Obviously, the trustee, in proposing a single sale of the entire estate, could not have been *engaging in the business of making sales at retail*.

The author of the opinion in that case has, however, applied the California Alcoholic Beverage Control Act to a single sale of warehouse receipts to alcoholic beverages located in this state and held that the owner of such warehouse receipts must *possess a license* in order to make a *single sale* of his property.

Rude v. Collins, et al., No. 615-M, Civil, U. S. District Court, Southern District of California, Central Division. Opinion transcribed but not reported, September 16, 1940.

In the case of *In re Conkey*, No. 38,829C in the same court and division, a motion to dismiss a petition for injunction restraining state enforcement officers from prosecuting or threatening to prosecute a trustee in bankruptcy for a proposed *single sale* of alcoholic beverages received from the bankrupt was granted without opinion.

In the case of *People v. United States etc. Co.*, 45 Cal. App. (2d) 474, the state court held a liquidating receiver appointed by a bankruptcy court, in making a sale of alcoholic beverages, was subject to the California Beverage Tax Act, although he did not engage in the business of making such sales, and the court

there concluded that the case of *In re Pea Products Inc.*, supra, had no bearing upon the application of statutes of the State of California relating to alcoholic beverages.

We have no quarrel with the holding of the cases cited in this portion of the brief, but respectfully submit that they have no bearing upon the case and do not support appellee's conclusion on this point, reading (page 10):

“* * * a trustee in bankruptcy is not subject to the payment of this tax during administration of the estate.”

The trustee is required to pay the license fee—a tax in the broad sense—if he desires to possess the distillery equipment involved in this proceeding.

2. THE CONTENTION THAT THE LICENSE FEE IS NOT YET DUE OR PAYABLE.

The burden of appellee's contention in this portion of his brief is that the license fee in question

“* * * did not become payable until such time as the trustee rendered his account of his administration and was authorized to pay this tax by the referee * * *” (page 10).

It is then said that the State should file a claim or procure an order authorizing the trustee to pay the fee in advance of that time. The authority cited is Section 64 of the Bankruptcy Act as amended to June 22, 1938, setting forth the order of payment and

priority of claims filed in a bankruptcy proceeding and costs and expenses incurred, preserving the estate subsequent to the filing of a petition in bankruptcy.

We frankly confess our inability to appreciate the pertinence of the provisions of the Bankruptcy Act relating to priority of payment of claims and expenses. The simple fact of the matter is that unless and until the trustee applies for a license to possess the instant distilling equipment the license fee was not due by the terms of the Act. The license fee is paid for the privilege of possessing the still. If the trustee does not desire a license and does not pay the license fee, he does not acquire the privilege of possessing the distillery equipment and becomes liable to prosecution under the Act and the distillery equipment is forfeited to the State.

We agree with appellee that the fee in this case did not become due, but appellant denies that any question of priorities is presented. Rather, the fee was not due because there was no application for the license to which the payment of the fee was a condition precedent.

Alcoholic Beverage Control Act, Sec. 5(4).

Section 10 of the Act provides, in addition, "to obtain a license under this act application therefor, verified under oath, accompanied by the licensee fee therefor, must be made to the Board upon a form prescribed by the Board. * * *"

Such a license fee is not under the California law collectible where no application for license is made,

even though the licensed activity is conducted in direct violation of the licensing act. See:

People v. Craycroft, 2 Cal. 243.

A purported license issued pursuant to such a licensing act without the prepayment of the required fee is void.

As was stated in *Woolen and Thornton on Intoxicating Liquors*, Section 491:

“Where a statute requires the fee for a license to be paid before it is issued, it must be paid for the entire period of the license and be paid in advance, or the license will be void. No officer can waive such a provision of the statute. Payment in part is not sufficient, even pro tanto;
* * *”

and, as stated in *Joyce on Intoxicating Liquors*, Section 196:

“As a general rule, it is a condition precedent to the issuance of a valid license that the fee therefor shall be paid in advance. A license issued on credit and without authority to so issue it is held not to be voidable merely, but void in the sense that it may be assailed even in a collateral proceeding.”

See, also, *Town of Gallup v. Gallup etc. Co.* (N.M.), 191 Pac. 465, for a collection of authorities on this point.

The trustee was required either to procure a license or to incur the penalties provided in the Act. The cases cited in this portion of the brief are not in point and for that reason require no further analysis.

3. THE CONTENTION THAT THE DISTILLING EQUIPMENT
HAD NOT FORFEITED TO THE STATE PRIOR TO BANK-
RUPTCY.

It is argued that the bankrupt possessed a license entitling him to own and possess the instant distilling equipment and that a failure to renew the license and pay the renewal fee did not result in a termination of the license privileges. It is further argued that under section 8 of the Alcoholic Beverage Control Act the license continued and the only penalty for failure to apply for a renewal and pay the renewal fee was the addition of a money penalty determined by the Board and not exceeding 25% of the amount of the fee due.

Concluding this argument, appellee declares (p. 17):

“* * * the bankrupt was only delinquent in the payment of the yearly license fee, that the only penalty which could be enforced against said bankrupt, or his successor in interest, the trustee, would be the collection of a twenty-five per cent penalty for the failing to pay said tax.”

This contention is not only erroneous, but is derived from a direct misstatement of the provisions of the Act. The provision of section 8 of the Act which counsel has quoted on page 16 of appellee's brief had been *repealed* for more than two years prior to the transactions involved in this case. At all times material to this proceeding, section 8 of the Alcoholic Beverage Control Act, relating to renewals, provided as follows:

“* * * All other licenses (other than retailers' on-sale licenses) issued under this act shall be issued on the basis of a fiscal year commencing July first and ending July thirtieth.

Every license issued under this act, effective on or after January 1, 1938, other than a temporary license, shall be renewable unless such license has been revoked, provided that renewal application is made and that the fee therefor is paid on or before the date on which payment thereof is due. If the fee for any license is not so paid, such license is automatically suspended, but may be reinstated by the board within thirty days thereafter upon payment of the amount due and in addition thereto, of such penalty as the board may by regulation prescribe, not to exceed twenty-five percent of the annual fee for such license. Unless such license is so reinstated, it is automatically revoked thirty days after the date upon which payment therefor is due, and no license shall be issued to the licensee thereunder except upon a new application.”

It is thus apparent that by operation of law the bankrupt's license was terminated, revoked, and of no further effect, at least twelve days before the bankrupt filed his debtor's petition under section 322 of the Bankruptcy Act, on August 12, 1939. We do not wish to be understood, however, as conceding that appellee's interpretation of the earlier Act would have the effect he gives it.

The other argument made in this portion of the brief is that the forfeiture provided by the Act did

not occur and is dependent upon the judgment provided in the Act for the enforcement and confirmation of the forfeiture occurring upon the unlawful possession of the still.

The case of *People v. Broad*, 216 Cal. 1, is cited. In that case the state court held a forfeiture statute which did not provide for notice and an opportunity for hearing to the persons interested in the forfeited property before a judgment confirming the forfeiture could be declared was unconstitutional. The court states its holding as follows (p. 9):

“ * * * we must hold the portion of the act which purports to authorize forfeitures without notice to the owner to be invalid. ’ ”

The provisions of section 52 of the instant Act obviate the defect of the statute involved in the latter case.

This forfeiture statute is patterned after that contained in the State Narcotic Act. (Statutes 1935, page 2212, now codified in section 11,000 et seq. of the Health and Safety Code; Deering's General Laws, Act 5323.)

The provisions of said statute are constitutional. See:

People v. One 1933 Plymouth, 13 Cal. (2d) 565;
Van Oster v. Kansas, 272 U. S. 465, 47 S. Ct.
 133, 47 A. L. R. 1044;
People v. One Harley Davidson, 5 Cal. (2d)
 188.

Such forfeitures are effective upon the date of the unlawful act, and the judgment or confirmation merely determines the fact of forfeiture.

See:

United States v. Stowell, 133 U. S. 1, 10 S. Ct. 244 (cited in our Opening Brief, p. 17).

At this point we quote the following pertinent statement of the law contained in 23 American Jurisprudence at pages 606 and 607, on the subject of forfeitures and penalties:

“* * * When * * * a forfeiture is declared by a statute, as is the procedure in this country under both Federal and state laws, the rules of the common law may be dispensed with, and the title to the thing forfeited may either vest immediately or on the performance of some particular act, according to the will of the legislature. This occurrence of the vesting of the title must depend upon the construction of the statute. The legislature has the power to decide on what event a divestiture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation.

If a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the government, and the condemnation, when obtained, relates back to the time of the commission of the act and avoids all intermediate sales and alienations, even to purchasers in good faith. * * *

In some of the cases, the question has been directly presented whether, after the forfeiture has taken place but in the absence of any judgment declaring the forfeiture, the former owner could maintain any action in reference to the forfeited property, and it has been held that he could not.”

The footnote to the last sentence of the foregoing quotation from American Jurisprudence cites the following cases in support of this statement:

Oakland R. Co. v. Oakland etc. Co., 45 Cal. 365, 13 Am. Rep. 181;

McConathy v. Deck, 83 Pac. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896.

The forfeiture is effective upon the unlawful possession of the still by the bankrupt after his license privilege terminated, as provided in section 8 of the Act. The forfeiture provision is constitutional, and upon the unlawful possession, title to the still was transferred by operation of law to the State of California. Such a transfer is binding upon even *bona fide* purchasers.

United States v. Stowell, supra.

It follows that the still was forfeited before it came into the possession of the trustee.

4. THE CONFLICTING CLAIMS ARGUMENT.

This proceeding does not present conflicting claims between the State of California and the United States, as stated by appellee on pages 18 and 19 of his brief, and therefore his assertion that the law requires such conflicting claims to be determined in the bankruptcy court does not follow. The property, consisting of the still and equipment connected therewith, forfeited to the State prior to the time that the trustee in bankruptcy took possession, and the trustee only came into possession of *forfeited* property.

In this regard we again cite a case mentioned in our Opening Brief, viz.: *Traffic Truck Sales Co. v. Justice's Court*, 192 Cal. 377, at 383, which contains the following language:

“When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed. (Cases cited.) The adjudicated cases establish the rule beyond all doubt that the forfeiture becomes absolute on the commission of the prohibited acts, and that the title from that moment vests in the state. (*Henderson's Disilled Spirits*, 81 U. S. (14 Wall.) 44, 57 (20 L. Ed. 815).)”

Appellee complains on pages 21 and 22 of his brief about the steps taken by appellants in the bankruptcy proceedings. The procedure taken, however, was the only orderly and legal method by which appellants could proceed to enforce the rights of the state against the forfeited property. There was no conflict of sov-

ereign interests, since the state law controls the regulation of liquor and stills.

United States Constitution, Twenty-first Amendment;

California Constitution, Article XX, section 22;

California Alcohol Beverage Control Act.

If the United States had a lien against the forfeited property, then under section 52 of the California Alcoholic Beverage Control Act provision is made for the assertion of such claim or lien. No such procedure was followed by the appellee, and it is improper for him to complain at this late date that his rights, or the rights of the United States for taxes due, if any, for which a lien existed, had not been protected.

5. THE REFEREE IN BANKRUPTCY WAS WITHOUT JURISDICTION TO ENJOIN APPELLANTS.

At all events, it was improper for an injunction to issue against appellants to restrain them from enforcing the forfeiture for failure to pay the license fee.

The recent decision of *Corbett v. Printers & Publishers Corp., Ltd.* (U. S. Cir. Ct. of Appls., 9th Cir., decided April 13, 1942) 127 F. (2d) 195, held that a Federal court was without jurisdiction to enjoin a tax collection. It was pointed out in this case that Judicial Code, section 24(1) (28 U. S. C. A. sec. 41, subd. (1)), provides that no district court shall have jurisdiction of any suit to enjoin collection of any tax im-

posed by a statute if a sufficient remedy may be had in the courts of such state.

The remedy available to appellee in the case at hand was payment of the licensee fee under protest. Merely because appellee did not avail himself of this remedy does not change the rule announced in *Corbett v. Printers & Publishers Corp., Ltd., supra*, and the injunction was therefore improperly granted.

CONCLUSION.

With respect to the discussion of authorities contained in appellee's brief on pages 22-24 in his analysis of the argument made in our brief, we feel that nothing said requires answer, as we have fully stated appellants' position in our Opening Brief and in this Reply Brief.

Briefly stated, it is the position of appellants that the still property was forfeited at the conclusion of the license period, namely: June 30, 1939, and that thereafter the bankrupt and his successor in interest, the trustee (appellee herein), were possessed of forfeited property; and that the adjudication of bankruptcy and the appointment of appellee as trustee did not alter the legal title to the property, which had become vested in the State by operation of law. In any event, the trustee having failed to pay the license fee, the property then became forfeited. Therefore, the injunction was improperly granted and the State

should have been allowed to institute proceedings to confirm the forfeiture in the usual manner provided for by the State statutes.

It is again respectfully submitted that the judgment of the court should be reversed with directions to the court below to grant leave to appellants to proceed as they may be advised in the enforcement of the penal and forfeiture provisions of the Alcoholic Beverage Control Act of the State of California.

Dated, San Francisco, California,
June 8, 1942.

Respectfully submitted,

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No. 10077

United States
Circuit Court of Appeals
For the Ninth Circuit.

OMAHA WOODMEN LIFE INSURANCE SO-
CIETY, a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN, as trustee of an ex-
press trust,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Idaho,
Eastern Division.

FILED

APR 8 - 1942

PAUL P. O'BRIEN,
CLERK

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In the District Court of The Fifth Judicial District
Of the State of Idaho, in and for the County
Of Bannock.

No. 1140

HARRY E. KRUSSMAN, as trustee of an
express trust, Plaintiff,

vs.

OMAHA WOODMEN LIFE INSURANCE
SOCIETY, a corporation, Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action
against the defendant complains and alleges as fol-
lows, to-wit:

*Page numbering appearing at foot of page of original certified
Transcript of Record.

I.

That the defendant now is and ever since September 29, 1935, and for some time prior thereto has been a Fraternal Beneficiary Association incorporated under and by virtue of the laws of the State of Nebraska and qualified to do business in the State of Idaho as a foreign corporation, doing business of insuring the lives of its members, and that ever since the time first aforesaid until about the 4th day of August, 1937, the said defendant was doing business under the corporate name of Pacific Woodmen Life Association, and that on or about said last mentioned date the articles of incorporation of said defendant were amended changing its corporate name from Pacific Woodmen Life Association to Omaha Woodmen Life Insurance Society, and that ever since about the 4th day of August, 1937, the said defendant has been doing business under the corporate name of said Omaha Woodmen Life Insurance Society.

II.

That on the 30th day of September, 1935, one Eric A. Krussman was received into defendant corporation as a member thereof while it was doing business under the corporate name of Pacific Woodmen Life Association under a ten year term insurance [2] certificate hereinafter set out and remained such member in good standing and entitled to all the privileges and benefits appurtant to said membership until his death which occurred on August 3, 1940.

III.

That at the time the said Eric A. Krussman was so received as a member of said defendant corporation, the said defendant, then doing business under the corporate name of Pacific Woodmen Life Association, duly executed and delivered to him a certain written and printed certificate bearing date the 30th day of September, 1935, copy of which certificate is as follows:

Camp No. 7—Idaho Age 54
Certificate No. TE-1321001
Certificate amount, \$5,000.00

RATES:

Monthly	\$ 11.70
Quarterly	34.85
Semi-Annually	69.00
Annually	135.25

PACIFIC WOODMEN LIFE ASSOCIATION:

Ten-Year Term Insurance Certificate

Pacific Woodmen Life Association, a fraternal beneficiary association incorporated under the laws of the State of Nebraska, and referred to herein as the Association, for and in consideration of the warranties contained in the application of Eric A. Krussman for membership in the Association, and in further consideration of the payment to the Association of the sum of \$..... for the remainder of the month in which this certificate is dated by the Secre-

tary of the Association, and the payment to it of \$11.70 on or before the last day of each month thereafter, and for the remainder of the certificate year in which death occurs, issues this certificate of membership to him, as member and agrees that:

The Association will pay upon satisfactory proof of the death of the member, while in good standing, the sum of Five Thousand Dollars (\$5,000.00), to Sagred Marie Krussman, the beneficiary or beneficiaries herein, related to the member as Wife.

This Certificate shall cease and all benefits thereunder terminate and be of no effect from and after the tenth anniversary of the date of this certificate as dated by the officers of the Association, provided that the member may at any time within eight years from the date hereof and prior to attaining the age of sixty years surrender this certificate and receive in exchange therefor a certificate providing for term insurance for a period of ten years from the date of such exchange. The member will be required to pay the rate of the new certificate as fixed for his then attained age.

Or, the member may within eight years from date hereof and prior to attaining the age of sixty years exchange this certificate for any form of certificate issued by the Association, and the member shall pay the rate as fixed for such certificate received in exchange as is

charged for one of his then attained age. [3]
No medical examination shall be required to effect such change, except in the event the certificate selected shall provide for additional disability, double indemnity, or other benefits not contemplated or provided for in this certificate.

This Certificate is issued and accepted subject to all the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The articles of incorporation and the Constitution, Laws and By-Laws of the Association, and all amendments to each thereof which may be made hereafter; the application for membership, signed by the applicant and approved by the Medical Director of this Association, and when a medical examination is made, the statements of the applicant to the Medical Examiner as recorded by him and signed by the applicant, and this certificate shall constitute the agreement between the Association and the member, and copies of the same, certified by the Secretary of the Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the articles of incorporation, or the Constitution, Laws and By-Laws of the Association made subsequent to the issuance of this certificate, shall bind the member named herein and his beneficiaries, and shall govern and control the agreement in all

respects the same as though such changes, additions or amendments were in force at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the member, this certificate shall be null and void. Should this certificate become void for any cause, acceptance of any payment from or for the member, or other act by any Camp Officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract.

In Witness Whereof, Pacific Woodmen Life Association at Omaha, Nebraska, has caused this certificate to be signed by its President and Secretary, and the corporate seal thereof to be impressed thereon, this 30th day of September, A.D. 1935.

D. E. BRADSHAW,
President.

Attest:

R. FITZGERALD,
(Inspected and Counter-
signed.)
J. S. SATES,
Secretary.

(Corporate Seal)

Ten Year Renewable Term.

I have read the above certificate and accept the same, and warrant that I am now in good

health and have not been sick or injured since the date of my application.

This, the 26th day of September, 1935.

/s/ ERIC A. KRUSSMAN.

Witness: BAZIL FLEMING,
Financial Secretary. [4]

REGISTER OF CHANGE OF
BENEFICIARY

Note: Only the last appearing endorsement in effect.

Beneficiary changed to Marian Alice Krussman, Daughter.

See request for change.

Date Endorsed: 5-29-40.

Endorsed by Farrar Newberry.

PACIFIC WOODMEN LIFE
ASSOCIATION

Life Insurance.

Ten-Year Term

Certificate.

Sovereign

Eric A. Krussman

729 W. Center St.

Pocatello, Idaho.

Ctf. No. TE- 1321001 Amt.

Camp No. 7-Idaho \$5000.00.

IMPORTANT.

No camp or officer thereof nor any officer, employee or agent of the Assoc. has authority

to waive any of the conditions of this beneficiary certificate or of the Constitution and Laws of this Association.

CONDITIONS,

First. This certificate is issued in consideration of the representations, warranties and agreements made by the person named herein in his application to become a member, in the form and as passed upon and accepted by the Medical Director, and in consideration of the payment made when introduced in prescribed form; also his agreement to pay all assessments and dues that may be required of him during the time he shall remain a member of this Association.

Second. If the admission fees, dues and assessments required of the person named in this certificate are not paid to the Financial Secretary of his Camp as required by the Constitution, and Laws of this Association, the certificate shall be null and void.

Third. There shall be no liability on the Pacific Woodmen Life Association under this certificate until the member named therein shall have paid all entrance fees, one advance annual assessment or monthly installment of annual assessment for the month, signed this beneficiary certificate, and the acceptance slip attached thereto; been obligated or introduced by a Camp or authorized deputy in due form and

had manually delivered into his hands, in person, this beneficiary certificate while in good health. The foregoing provisions are hereby made a part of the consideration for and are conditions precedent to the payment of benefits under this Certificate.

Fourth. No legal proceedings for recovery under this certificate shall be brought within ninety days after receipt of proof of death by the Secretary of the Association, and no suit shall be brought upon this certificate unless said suit is commenced within one year from the date of death.

Fifth. If the applicant misstates his age, or if the amount of assessment collected is less than the required rate, for his correct age, then the benefits payable under the certificate shall be such an amount as the rate paid by the applicant would have purchased at his correct age. [5]

And thereby insured the life of the said Eric A. Krussman in the sum of Five Thousand and No/100 Dollars (\$5,000.00), which said certificate of insurance was in full force and effect at the time of his death.

IV.

That the said Eric A. Krussman, during his lifetime, fully complied with the requirements of the articles of incorporation of the constitution and laws of the defendant, and with all its regulations

and by-laws in force at the time of the issuance of said certificate, and thereafter adopted, and performed all of the agreements and conditions of said certificate on his part to be performed except the provision requiring the making of monthly payments of installments on or before the last day of the month in which they became due, which requirement and provision was waived by the defendant as follows:

That for more than three years prior to the death of Eric A. Krussman, it was the practice and general custom of the defendant in the course of dealing with a number of its members in the community in which the said Eric A. Krussman lived, and particularly with the said Eric A. Krussman to permit and accept monthly payments of installments on certificates of insurance after the month in which said payments became due, and plaintiff further alleges that the defendant's Financial Secretary, agent and representative in Pocatello, Idaho, for more than three years prior to the death of the said Eric A. Krussman was in the habit of personally collecting and did collect monthly payments of installments on the certificate above set forth covering the life of the late Eric A. Krussman after the month in which they became due, and during said time the said financial secretary almost invariably called at the residence of the insured herein for the payment of monthly installments on said certificate after the month in which the said [6] monthly installments became due, and in one or more instances

collected monthly installments for more than one month after the month in which the same became due, and that such over-due monthly installments were transmitted by said Financial Secretary to the defendant long after the month in which they became due and after the date required by Section 109 of the constitution, laws and by-laws of the defendant requiring the Financial Secretary to forward remittances on or before the 5th day of each month, and said defendant accepted and retained each and all of said installments so paid by the late Eric A. Krussman or by someone in his behalf. Plaintiff further alleges that said defendant, on or about February 1, 1940, paid to the said Eric A. Krussman the sum of \$10.55 representing gains and savings affected by said defendant apportionable to said certificate, which plaintiff is informed and believes and alleges was for the year 1939, and is informed and believes and on that ground alleges that from the time of the issuance of said certificate the said defendant annually paid to the late Eric A. Krussman an amount representing gains and saving affected by the society apportionable to said certificate, the amount of such annual payments so made being unknown to the plaintiff, except the payment of \$10.55 above mentioned, and plaintiff further alleges that on May 29th, 1940, the defendant endorsed change of beneficiary upon said policy from Sagred Marie Krussman, wife of said insured, to Marian Alice Krussman, his daughter; that on account of such course of dealing on

the part of defendant, the insured herein was led to believe and did believe and understand that prompt payment of the monthly installments would not be required, but that they would be received and accepted after due, and that said insured would be considered in good standing; that the insured, relying on the acts and conduct of the defendant and the custom and general course of dealing, as aforesaid, made payment of all premiums up to [7] the date of his death, as aforesaid, which were accepted and retained by the defendant who knew the same were not made in strict conformity with the certificate constitution, laws and by-laws of the defendant, and the defendant has by said acts, conduct and custom waived prompt payment and strict performance of the provisions in its certificate, constitution and by-laws, and is now estopped to invoke a forfeiture of said contract for failure to make prompt payments.

VI.

That on or about the 29th day of May, 1940, the beneficiary in said certificate was changed from Sagred Marie Krussman, wife of the insured, to Marian Alice Krussman, daughter of the insured, and that thereafter, to-wit on or about the 17th day of June, 1940, the said Eric A. Krussman delivered to Bazil Fleming, defendant's Financial Secretary of Bannock Camp No. 7, Pocatello, Idaho, a written request to change the beneficiary in said certificate from Marian Alice Krussman, his daugh-

ter, to his son, Harry E. Krussman, together with said certificate, and at about said time the said Basil Fleming acknowledged in writing on said request receipt of said certificate, and executed his statement in writing thereon that "it is understood that the change of beneficiary is now in effect," copy of which request, acknowledgement and statement is hereto annexed marked Exhibit "A" and by this reference made a part of his complaint the same as if set out at length; that a short time prior to the delivery of said request, as aforesaid, it had been orally agreed in substance between Eric A. Krussman and his son, Harry E. Krussman, that the said Eric A. Krussman was going to change the said certificate from Marian Alice Krussman to Harry E. Krussman and make it payable to Harry E. Krussman with the understanding that said Harry E. Krussman would receive the proceeds thereof in trust for the following purposes;—that is to say that he would use Three [8] Hundred Dollars (\$300.00) for the payment of burial expenses of said Eric A. Krussman; pay to Beatrice Krussman Ginzle, the insured's daughter, the sum of Seven Hundred Dollars (\$700.00) and hold in trust the remaining Four Thousand Dollars (\$4000.00) to be paid to Marian Alice Krussman for her use, enjoyment, support and education at the discretion of the said Harry E. Krussman, the trust to last until she reaches the age of majority; and the said Harry E. Krussman agreed to accept said trust; that the terms of said trust were later re-

duced to writing by a letter from Eric A. Krussman to Harry E. Krussman and a letter in reply thereto from H. E. Krussman accepting said trust, who is one and the same person as Harry E. Krussman, to said Eric Krussman, both of which letters are written on the same page and a copy thereof is hereto attached marked Exhibit "B" and by this reference made a part of this complaint the same as if set out at length.

VII.

That ever since the delivery of said request to said Financial Secretary, the plaintiff was and now is the beneficiary under said certificate, as trustee of an express trust, as aforesaid and that this action is brought by the plaintiff as such trustee; that plaintiff is informed and believes and on that ground alleges that since the death of said insured, there has been and still is in the treasury of the defendant a sufficient sum to pay the plaintiff's claim and all other just claims against the defendant.

VIII.

That Eric A. Krussman died on or about the 3rd day of August, 1940, and that this plaintiff on the day of August, 1940, more than ninety days before the commencement of this action furnished the defendant proof of death of Eric A. Krussman, and such other information as was required by the defendant, together with the [9] benefit certificate above mentioned and performed all the conditions

of said certificate and of the constitution, laws and by-laws of the defendant required to be performed on his part.

IX.

That defendant has refused to pay the amount due this plaintiff under said certificate or any part thereof, and that no part so due under said certificate has been paid, and that the said sum of Five Thousand Dollars (\$5,000.00) is now due thereon from the defendant to the plaintiff, together with interest thereon at the rate of six (6) per cent per annum from the 3rd day of August, 1940.

Wherefore, plaintiff prays judgment against the defendant in the sum of Five Thousand and No/100 Dollars (\$5,000.00), together with interest thereon at the rate of six (6) per cent per annum from July 3, 1940, until paid, and for all costs of suit.

JONES, POMEROY & JONES,
Attorneys for Plaintiff,
Residence and P. O. Address,
Pocatello, Idaho.

State of Idaho,
County of Bannock—ss.

T. D. Jones, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled action and makes this verification for and on behalf of said plaintiff for the reason that said plaintiff is absent from Bannock

County, Idaho, where this affiant resides and maintains his office; that he has read the above and foregoing complaint, knows the contents thereof, and the facts therein stated he believes to be true.

T. D. JONES.

Subscribed and sworn to before me this 5th day of February, 1941.

(Seal) M. H. McGLONE,

Notary Public for the State of Idaho Residing at Pocatello, Idaho. [10]

Exhibit "A"

Pocatello, Idaho
June 17, 1940

Mr. Basil Flemming
Financial Secretary
Bannock Camp # 7
Pacific Woodman Life Association
Omaha, Nebraska

Cashier Dept. M.
Aug. 8, 1940

Dear Sir:

Referring to Certificate #T E 1321001, policy in the name of Eric A. Krussman, I wish at this time to change the beneficiary from Marian Alice Krussman to my son, Harry E. Krussman.

I will appreciate your attention to this immediately. I am herewith turning over to you my certificate #T E 1321001, and would appreciate your

attending to the matter at your earliest possible convenience.

Yours sincerely,

/s/ E. A. KRUSSMAN

Received August 8, 1940

Claim Dept.

Acknowledging Certificate #T E 1321001, for which I hereby receipt for receiving same.

/s/ BAZIL FLEMING

It is understood that this change of beneficiary is now in effect.

/s/ BAZIL FLEMING. [11]

Exhibit "B"

Pocatello, Idaho,
June 20, 1940.

Mr. Harry E. Krussman,
Twin Falls, Idaho.

My dear Harry:

As you know, from our discussion here last Sunday, I hold Certificate No. TE 1321001, Policy in Pacific Woodman Life Association, for the sum of \$5,000.00 payable to Marian Alice Krussman as beneficiary. I explained to you there were spiritual reasons that I did not want to have a guardian appointed over Marian for the collection and disposition of the proceeds of said policy; and in order to obviate the necessity of appointing a guardian, that I was going to change the beneficiary in the policy and make it payable to you, with the understanding of course that you would receive the pro-

ceeds in trust for the following purposes, that is to say, that you would use \$300 of the same for my burial expenses, pay to Beatrice Krussman Ginzell, my daughter, \$700; and the remaining \$4,000.00 to be held in trust and paid by you to Marian Alice Krussman for her enjoyment, support and education. That the payments to be made to her shall be at your discretion, as I know you will handle the matter for her best interests, the trust to last until she shall arrive at the age of majority, when the balance shall be paid to her by you.

At the time I had the discussion with you, you stated that you would be willing to accept the trusteeship, and handle the matter as I desire. As you know, I have always been grateful to you for what you have done, and for what you will do in taking care of this matter, which is the most important thing to me which I can conceive of.

With love from your father,
/s/ ERIC A. KRUSSMAN.

Twin Falls, Idaho
June 25, 1940.

Mr. Eric Krussman
Pocatello, Idaho.

Dear Father:

I have just received the foregoing letter from you in which you refer to the conversation we had, and in which you state you are going to change the beneficiary under the certificate above described, from Marian Alice Krussman to myself, in order

that I may receive the proceeds direct and handle the same as directed in the above letter.

In the event that I am made beneficiary under such certificate, I hereby agree to accept the terms of the trust above set out and agree that if, as and when any moneys shall come into my hands as the proceeds of Certificate No. TE 1321001, policy in Pacific Woodman Life Association, I will use the sum of \$300 thereof for the payment of your burial expenses, immediately pay [12] to your daughter, Beatrice Krussman Ginzle the sum of \$700 and hold in trust the sum of \$4,000, being the remaining proceeds of said policy, for the use, enjoyment, benefit, education and support of your daughter, Marian Alice Krussman, part or all of said \$4,000 to be paid to her during the time she is under the age of majority as in my discretion shall appear to be most beneficial to her; and I further agree that any of the said Trust fund belong to said Marian Alice Krussman remaining in my hands after she shall have reached the age of majority will be by me paid to her.

Your son,

/s/ H. E. KRUSSMAN.

[Endorsed]: Filed in County Court Feb. 5, 1941.

[Endorsed]: Filed in U. S. District Court March 26, 1941. [13]

[Title of County Court and Cause.]

ORDER ON REMOVAL OF CAUSE TO THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, EASTERN
DIVISION

This Cause came on for hearing upon the petition of Omaha Woodmen Life Insurance Society, a corporation, the above named defendant, for an order removing this cause to the District Court of the United States, for the District of Idaho, Eastern Division; and it appearing to the Court that said petition is in due form and is presented for filing within the time required by law, and that the bond accompanying said petition is conditioned as provided by law; that the notice required by law of the presentation and filing of said petition and bond had, prior to the presentation and filing thereof been served upon the plaintiff, which notice the Court finds is sufficient and in accordance with law; and it appearing to the court that this is a proper cause for removal to the District Court of the United States, for the District of Idaho, Eastern Division;

Now therefore it is hereby ordered, adjudged and decreed that the said bond be, and the same is hereby accepted and approved; and that the above entitled cause be, and the same is hereby removed to the District Court of the United States, for the District of Idaho, Eastern Division, and that all further proceedings in this court be stayed, and the

Clerk of this Court is hereby directed to make up the record in said cause and submit the same to the United States District Court for the District of Idaho, [14] Eastern Division, on or before thirty days from the date of filing of said petition.

Done in open Court this tenth day of March, 1941.

JAY L. BOWNING

District Judge

[Endorsed]: Filed March 10, 1941. [15]

In the District Court of the United States, for the
District of Idaho, Eastern Division.

HARRY E. KRUSSMAN, as Trustee of an express
trust,

Plaintiff,

vs.

OMAHA WOODMEN LIFE INSURANCE
SOCIETY, a corporation,

Defendant.

ORDER

The Stipulation of the above named parties, through their counsel of record, signed and dated March 31, 1941, for an enlargement of time to further plead, having been presented to the Court, the same is hereby in all respects approved and the time within which the defendant may further plead, as in said Stipulation provided, is hereby enlarged

and extended up to and including the 1st day of May, 1941.

Dated, this 31st day of March, 1941.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed April 1, 1941. [16]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Omaha Woodmen Life Insurance Society, a corporation, and, without waiving any particular defense available to it by pleading any other defense, but expressly relying upon each and all of them, and for Answer to the complaint of the plaintiff on file herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation of said complaint not hereinafter specifically admitted.

II.

Answering Paragraph numbered I of said complaint, the defendant admits the allegations therein contained and alleges that it is incorporated under the laws of the State of Nebraska, with a lodge system, a ritualistic form of work and a representative form of government, without capital stock, and transacts its business without profit and for the

sole benefit of its members and their beneficiaries, and that it is now and at all times mentioned in said complaint has been organized and operated as a fraternal benefit society pursuant to the laws in such case made and provided. [17]

III.

Answering Paragraph numbered II of said complaint, the defendant admits that on or about the 30th day of September, 1935, one Eric A. Krussman was received into defendant corporation as a member thereof and there was issued to him a Ten-year Term Insurance Certificate substantially as set out in Paragraph III of said complaint, but defendant denies that the said Eric A. Krussman remained such member in good standing and denies that he was entitled to all or any of the privileges and benefits appurtenant to said membership at the time of his death which occurred August 3, 1940, but alleges in this respect that sometime prior to his death he became suspended and said Certificate became void and was void at the time of his death.

IV.

Answering Paragraph III of said complaint, defendant admits that there was executed and delivered to Eric A. Krussman a certain written and printed Certificate bearing date of the 30th day of September, 1935, substantially in words and figures as set out in said Paragraph, but defendant denies that said Certificate of Insurance was in force and

effect at the time of the death of Eric A. Krussman. [18]

V.

Answering Paragraph numbered IV of said complaint, the defendant admits that Eric A. Krussman, during his lifetime complied with the requirements of the Articles of Incorporation and of the Constitution and Laws of the defendant and with all of its regulations and By-Laws in force at the time of the issuance of said Certificate and thereafter adopted, except as alleged in this Answer, and that he performed all of the agreements and conditions of said Certificate on his part to be performed except the provision requiring the making of monthly payments of installments on or before the last day of the month in which the same became due, but denies such requirement and provision was waived by the defendant as alleged in said paragraph or at all. Defendant admits that on or about February 1, 1940, it paid Eric A. Krussman the sum of \$10.55. Defendant positively denies each and every other allegation contained in said numbered paragraph.

Further answering said paragraph, defendant alleges that the payment made on behalf of Eric A. Krussman by check dated July 19, 1938, for the June, 1938, installment, and all subsequent payments were made after said Certificate had terminated and become void and were for reinstatement of said member under the provisions of Section 65 of the Constitution, Laws and By-Laws of said de-

fendant, and such payments were accepted by the defendant under the warranty of good health and without knowledge on its part of the fact that the said Eric A. Krussman was in ill-health and could not have been reinstated, and by reason of the premises and of the provisions of the contract, which includes the Constitution, Laws and By-Laws, said Certificate remained void and defendant waived no rights and is not estopped to deny liability by accepting such delinquent payments or for any other reason. [19]

VI.

Answering Paragraph numbered VI of said complaint, defendant denies that on or about the 29th day of May, 1940, or at any other time, there was a change of beneficiary in said Certificate from Sagred Marie Krussman, wife of assured, to Marion Alice Krussman, or that later there was any change from Marion Alice Krussman to Harry E. Krussman, alleging in this respect that such changes could not have been made because said Certificate was at such times void and of no force or effect. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in said paragraph and upon this ground denies each and every other allegation contained therein.

VII.

Answering Paragraph numbered VII of said complaint, the defendant admits that during the time mentioned in said complaint there has been and

there still is in the treasury of the defendant a sufficient sum to pay the amount demanded in said complaint, but defendant denies each and every other allegation contained in said paragraph.

VIII.

Answering Paragraph numbered VIII of said complaint, the defendant admits that said Eric A. Krussman died on or about the 3d day of August, 1940, but denies each and every other allegation contained in said paragraph. Defendant alleges that such "Proofs of Death" which were submitted to it purported to be on behalf of Harry E. Krussman as an individual and not as a Trustee. [20]

IX.

Answering Paragraph numbered IX of said complaint, the defendant admits that it has refused to pay the sums demanded by the plaintiff, but denies each and every other allegation contained in said paragraph.

Further answering said complaint, and by way of an additional and affirmative defense thereto, the defendant alleges:

I.

That the defendant is a corporation organized without capital stock and for the sole purpose of mutual benefit of its members and their beneficiaries and not for profit, and having a lodge system with ritualistic form of work and a representative form of government; that it has the power and does

issue certain insurance certificates for the benefit of its members, one of which said certificates was on or about the 30th of September, 1935, issued to one Eric A. Krussman, and is the Certificate referred to in the complaint.

II.

That said Certificates, and particularly the one issued to Eric A. Krussman, contained, among other things, the following express provision:

“This Certificate is issued and accepted subject to all the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The Articles of Incorporation and the Constitution, Laws and By-Laws of the Association, and all Amendments to each thereof which may be made hereafter; the Application for membership, signed by the applicant and approved by the Medical Director of this Association, and when a medical examination is made, the statements of the Applicant to the Medical Examiner as recorded by him and signed by the Applicant, and this Certificate shall constitute the agreement between the Association and the Member, and copies of the same, certified by the Secretary of the [21] Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the Articles of Incorporation, or the Constitution, Laws and By-Laws of the Association made

subsequent to the issuance of this Certificate, shall bind the Member named herein and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments were in full force at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the Member, this Certificate shall be null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the Member, or other act by any Camp officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract."

III.

That the application referred to in said Certificate, among other things, provides:

"I hereby certify, agree and warrant that I am of sound bodily health and mind; that I am temperate in habits and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the Association now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any Beneficiary Certificate that may be issued to me by the Sovereign Camp of

the Pacific Woodmen Life Association, whether printed or referred to therein or not.

“I hereby waive the attaching of copies thereof to said Certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto; and I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure.” [22]

IV.

Section 63 of the Constitution, Laws and By-Laws of said defendant, in so far as the same has application to this case, provides:

“Sec. 63(a). In order to accumulate and maintain funds for the payment of benefits stipulated in Beneficiaries Certificates held by the Members of this Association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Association, every member of this Association shall pay to the Financial Secretary of his Camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these Laws or by the provisions of his Beneficiary Certificate, which shall be credited to and

known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the By-Laws of his Camp.

“(b) If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his Beneficiary Certificate shall be void, the Contract between such person and the Association shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Association as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said Member from the delivery of his Certificate to the date of his suspension. * * * ”

V.

Section 65 of the Constitution, Laws and By-laws provides:

“Any member who has become suspended because of the nonpayment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making

such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained without waiving any of the provisions of this section or of these [23] Laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments of assessments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

VI.

Section 66 of the Constitution, Laws and By-Laws provides:

"Section 66(a). The retention by the Association of any installment of assessment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or any estoppel upon the Association.

"(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact

in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment or assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the Certificate shall be null and void.”

VII.

Section 82 of the Constitution, Laws and By-Laws, among other things, provides:

“Sec. 82(a). No officer, employee or agent of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions upon which Beneficiary Certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor shall any custom on the part of any Camp or any number of Camps—with or without the knowledge of any officer of such Association—have the effect of so changing, modifying, waiving or foregoing such Laws or requirements. Each and every Beneficiary Certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these Laws by the Association or an estoppel of this Association.” [24]

VIII.

That Section 107 (g) of the Constitution, Laws and By-laws of the defendant, adopted June, 1939, and which Section is substantially the same as the provisions of Section 109 (g) of the 1935 Constitution, Laws and By-Laws, provides:

“The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-laws of this Society nor to bind the Society by any such acts.”

IX.

That all of the above quoted provisions of the Constitution, Laws and By-Laws, were in force and effect when said certificate was written and became part of said contract and remained such during the life thereof; that by quoting said provisions defendant does not waive any other pertinent provision of said Constitution, Laws, By-Laws, Application or Certificate applicable to the matters herein alleged and to the defenses herein asserted.

X.

That pursuant to the provisions of said contract the said Eric A. Krussman agreed to pay the assessments and dues in installments of \$11.70 per month and further agreed that said sum should be paid before the last day of the month for which

said installment became due and if the same were not so paid the Certificate would automatically terminate and become void and the member suspended. That the said Eric A. Krussman failed to pay the installment for the month of June, 1938, as provided in said Certificate on or before the last day of June, 1938, and by reason thereof and of the provisions of the Constitution, Laws and By-Laws of the defendant, he thereby became suspended and said Certificate became null and void on the 1st day of July, 1938. That on July 19, 1938, a check was tendered the Financial Secretary for the installment which became due in June, 1938, and that thereafter each and every payment tendered the Financial Secretary was tendered subsequent to the month in which it would otherwise have become payable and in each [25] instance was made after the Certificate terminated and became void and the member suspended and while the said Eric A. Krussman was not in good health but in such condition of health that the said Certificate of Insurance could not have been reinstated and that said payments and each of them were accepted by the defendant without knowledge that the said Eric A. Krussman was in ill-health at said time, and because of the warrant of good health made by the tender of such delinquent payments as provided in Section 65 of the Constitution and Laws of the defendant.

XI.

That on or about the 22nd of July, 1938, the said Eric A. Krussman became stricken with a disease or ailment from which he never recovered and which was the subsequent cause of his death in August, 1940; that when the payment by check dated July 19, 1938 was transmitted on behalf of the said Eric A. Krussman for the June, 1938, installment, the said Certificate of Insurance had been automatically cancelled and was void and of no force or effect; that the said Eric A. Krussman did not remain in good health for a period of thirty days after suspension within the meaning of the Contract, but on the contrary was in such condition of health that he could not have been accepted nor reinstated as a member of the defendant, nor could said Certificate of Insurance have been revived. That this same situation existed each and every month thereafter in that during each and every month the same default occurred and a similar condition of ill-health existed. That by the terms of the Contract, as hereinbefore recited, the tender of such payment was a guaranty, representation and warranty that said person on whose behalf such payment was tendered was in fact in good health, and was likewise a warranty that he would remain in good health for at least thirty days after the attempt to again become a Member; that in the acceptance of said payments said defendant acted upon said representation and warranty; that said warranty was false and untrue and the [26] defend-

ant did not know at any time after said default and prior to the death of the said Eric A. Krussman that it was false and that he was not in good health and the retention of said payments made after default did not and could not have constituted a waiver of any right or an estoppel of the defendant to resist payment under the Certificate. That the physical condition of health of said Eric A. Krussman after July 22d, 1938, as well as the failure on his part to advise the defendant of his ill-health, rendered it impossible to cause a reinstatement of said Certificate at any time after said default and the same remained void and of no force or effect.

XII.

Defendant further alleges that whether or not the "Financial Secretary" knew of the condition of health of the said Eric A. Krussman when said delinquencies were tendered (the knowledge of which is hereby denied) was wholly immaterial by reason of the matters and things hereinbefore alleged and particularly the provisions of the Constitution, Laws and By-Laws, and that his transmission of said funds to the Secretary of the defendant corporation even though after the date when the same should have been transmitted could not and did not constitute a waiver of any of the provisions of said contract, nor, for the reasons hereinbefore stated, constitute any estoppel of the defendant in asserting its rights herein.

XIII.

Defendant further alleges that it did not learn of the condition of health of the said Eric A. Krussman until sometime after his death; that thereupon and upon learning that said installments had been paid on behalf of said Eric A. Krussman after forfeiture of said contract the said defendant did thereafter make written tender to the said Harry E. Krussman of the payments made between and including July, 1938, and August, 1940, aggregating \$294.80, less [27] the sum of \$10.55 heretofore paid upon the erroneous assumption that the said Eric A. Krussman was in good health and which tender was refused; that defendant hereby again renews said tender and now offers to pay to the plaintiff herein said sum and to keep said tender good.

Further answering said complaint, the defendant alleges:

I.

That said complaint does not contain facts sufficient to constitute a cause of action against the defendant.

Further answering said complaint, the defendant alleges:

I.

That this action has not been brought by the real party in interest.

Wherefore, defendant prays that said action be dismissed and that defendant have such further, or

other relief as to this Honorable Court seems meet and equitable, including its costs herein incurred.

RAINEY T. WELLS

Residing at Omaha, Nebraska

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for Defendant

(Duly verified) [28]

Service of the foregoing Answer, by receipt of copy thereof, acknowledged this 1st day of May, A. D. 1941.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff,

Residing at Pocatello, Idaho.

[Endorsed]: Filed May 1, 1941. [29]

[Title of District Court and Cause.]

MOTION TO AMEND BY INTERLINEATION

Comes now the defendant, and in order to conform to the proofs heretofore adduced in depositions, and to more accurately state the facts involved in the defense of said cause, moves the above entitled court for permission to amend its Answer on file herein by interlineation, in the following particulars, to-wit:

I.

In Paragraph numbered X of defendant's additional affirmative defense, on Page 9 of said pleading:

(a) Delete from Line 8 the words "July, 1939" and insert in lieu thereof the words "June, 1938."

(b) Delete from Line 9 of said paragraph the words "July, 1939", and insert in lieu thereof the words "June, 1938."

(c) Delete from Line 12 the words "August, 1939", and insert in lieu thereof the words "July, 1938" and in the same line delete the words "August 24, 1939" and insert in lieu thereof the words "July 19, 1938." [30]

(d) Delete from Line 14 the words "July, 1939" and insert in lieu thereof "June, 1938."

II.

In Paragraph XI of said pleading, on page 10 thereof:

(a) Delete from Line 1 of said Paragraph the words "Month of August" and insert in lieu thereof the words "22nd of July."

(b) Delete from Lines 4 and 5 of said paragraph the words "August 24, 1939", and insert in lieu thereof the words "July 19, 1938."

(c) Delete from Line 6 of said paragraph the words "July, 1939" and insert in lieu thereof the words "June, 1938."

(d) Delete from Lines 8 and 9 of said paragraph the words "was at that time not in good

health", and insert in lieu thereof the words "did not remain in good health for a period of 30 days after suspension."

(e) Delete from Line 7, on Page 11 of Paragraph No. XI the word "August", and insert in lieu thereof the words "the 22nd of July."

III.

In Paragraph XIII, on page 11 of said pleading:

(a) Delete from Lines 5 and 6 the words "On or about the 14th day of November, 1940" and insert in lieu thereof the word "thereafter."

(b) From Line 8 of said paragraph, delete the words "August, 1939" and insert in lieu thereof the word "July, 1938", and delete from said line the figure "\$163.80" and insert in lieu thereof "294.80."

Dated October 6, 1941.

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

RAINEY T. WELLS

Residing at Omaha, Nebraska

Attorneys for Defendant

[Endorsed]: Filed Oct. 13, 1941. [31]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 13, 1941

The defendant's motion to amend the answer by interlineation was granted by the Court. [32]

[Title of District Court and Cause.]

OPINION

T. D. Jones, Pocatello, Idaho

Ralph H. Jones, Pocatello, Idaho

Attorneys for the plaintiff

A. L. Merrill, Pocatello, Idaho

R. D. Merrill, Pocatello, Idaho

Attorneys for the defendant

December 5, 1941

Cavanah, District Judge:

The action was brought by the plaintiff as Trustee, against the defendant, to recover upon a certificate of insurance issued by the Pacific Woodmen Life Association, in the sum of \$5,000 to Eric A. Krussman, payable to his wife Sagred Marie Krussman, beneficiary. The beneficiary was thereafter changed with directions to distribute the proceeds of the certificate, the sum of \$4,000 to Marian Alice Krussman a daughter; \$700 to Beatrice Krussman Ginzl, a daughter, and \$300 for burial expenses.

Since the issuance of the certificate the Pacific Woodmen Life Association was changed to the de-

fendant, The Omaha Woodmen Life Insurance Society.

On August 2, 1940, Eric A. Krussman died and proof of loss was made within the required time. At the time of Krussman's death all installments had been paid. The claim for the insurance was rejected by the defendant, it being claimed by it that the payments of the installments for July, August, September, October, November and December in the year 1939, and for [33] January, February, March, April, May and June in the year 1940 were not paid before the last day of the month in which the installments were due under the certificate of insurance.

At the time the claim for insurance was made to and rejected by the defendant, there was inclosed in the letter of rejection a check or refund warrant payable to the plaintiff in the sum of \$153.25, which the defendant claimed was to cover installments paid by the insured from July 1939 to and including the months of January, February, March, April, May and June 1940, less \$10.55 theretofore paid in February 1940 as gains and savings apportionable to the certificate, which were returned to the defendant. Some nine months thereafter, the defendant made a new tender of \$294.80 to cover all assessments paid by the insured subsequent to July 1, 1938, less distribution of gains and savings paid on the certificate in 1939 and 1940, which the plaintiff refused.

It seems that at the time from the issuance of

the certificate until the death of the insured some of the installments were not paid during months due, but were accepted by the financial secretary and the proceeds transmitted to the defendant, who retained the same and applied them upon payments in arrears, all of which payments were made by checks excepting two were made payable to the defendant and bore date. They were drawn by Eric A. Krussman or by someone in his behalf and were received and endorsed by the defendant. It does not appear that any notice or claim was given to the insured that his certificate was not in full force. The defendant in a letter of February 1940, to the insured informed him that its directors had authorized payment of a cash refund for 1939 on certificates in force two or more years, and inclosed check for \$10.55, and such payments were made to the insured during 1938, 1939 and 1940 representing gains and savings apportionable to his certificate. These letters recognized that Krussman was in good standing and whether a waiver of forfeiture of a certificate of insurance will be found depends on the effect which the conduct or course of business of the insurer has had upon the insured and [34] is not limited to what the intention of the insurer was. *Rasicot v. Royal Neighbors of America*, 18 Idaho 85; 108 Pac. 1048.

There does not appear any concealment of Krussman's illness, as the financial secretary, or agent of the defendant, had knowledge of insured's condition immediately after his first stroke.

Section 105 of defendant's constitution and by-laws (1939 edition) provides: "The financial secretary shall have charge of all of the accounts of the members and attend to the correspondence concerning the standing of the members * * * he shall make all reports and mail or deliver all notices required * * * etc." It appearing that the financial secretary, the agent of the defendant had knowledge of Krussman's condition, which he acquired within the scope of his powers and duties and it is presumed that he performed his duty as required by the regulations, and the defendant had actual knowledge of insured's condition, and if he failed to advise his principal of insured's illness, still, knowledge of such illness on the part of the financial secretary, which he acquired while acting as agent of the defendant would be imputed to the defendant. It is conclusive presumption, in absence of fraud, that the agent seasonably communicated the fact of insured's condition to the defendant. *Rasicot v. Royal Neighbors supra.*

The principal question under the evidence is that Krussman was never suspended or reinstated, as the payments made by him, although out of time, were not made for the purpose of again making him a member. If he was not suspended he never ceased to be a member. It cannot be said under the evidence that he was suspended or reinstated because he never was treated as a suspended member by either the financial secretary or the home office. They never advised him of such and his money

was accepted and retained, and no one connected with the defendant ever advised him that his money was accepted and retained by the defendant merely for the good of the order. [35]

These payments were made to continue the certificate in force, and not for reinstatement. It is fair to say that while the contract of insurance provides for the payments to be made within a specified time, the financial secretary permitted the insured to make the payments after that time and they were sent in and accepted and retained by the defendant over a long period. They treated the certificate as still continuing.

That being true the question of reinstatement is not here involved for the payments made within the time recognized by the defendant are sufficient to keep the policy alive was sufficient to avoid a suspension or forfeiture, and therefore there was no occasion for reinstatement. *Conklin vs. Knights and Ladies of Security*, 166 N. W. 384.

It seems to be the sound rule that if an Association like the defendant adopts the custom of receiving payment of dues after the day named in the contract for such payments, which leads the insured to believe that his policy would not be forfeited if he continues to pay in accordance with such custom, an insurer thereby waived the right of forfeit of the policy. *Chandler v. Royal Highlanders*, 162 N. W. 642. *Kennedy v. Grand Fraternity*, 92 Pac. 971.

The basis upon which the doctrine of waiver stands is that it has for its existence the assumption that by reason of the action of the Association, the insured has been misled to his prejudice, and because the insured did not strictly observe the precise time of payment it ought not to be held to forfeit his rights.

Attention is directed to Section 40-2331 I. C. A. which relates to the authority of adoption of by-laws and that local camp officers cannot waive any of the provisions of the policy does not prevent the association itself from waiving the provisions of its constitution and by-laws, or prescribe changes of rules of agency as the defendant has done here.

[36]

The Supreme Court of Idaho in the case of *Rascicot v. Royal Neighbors of America*, supra, approved the principle enunciated by the Iowa Supreme Court in the case of *Trotter v. Grand Lodge Legion of Honor*, 132 Iowa 513; 109 N. W. 1099, where it was said by the Iowa Supreme Court: "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applied to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against who it is asserted, but on the effect which its conduct or

course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake.” And announces the principle in Idaho that waiver applies to fraternal associations the same as other insurance companies, and gives effect to any circumstance or act which it may be fairly contended that the insurer has waived a right to strict performance by the insured, and whether forfeiture of a policy of insurance exists depends not on the intention of the insurer but on the effect which its course of business or conduct has upon the insured, and that the financial secretary is the agent of the defendant, and being the agent, the presumption is, in absence of fraud, that he seasonably conveyed to the defendant knowledge which he acquired while acting within the scope of his authority.

And the Ninth Circuit Court of Appeals in the case of *Order of United Commercial Travelers vs. Campbell*, 115 Fed. (2) 743, settled the primary question here involved effecting the liability of the defendant after referring to the Washington Court, of adhering to the rule that by-laws of a fraternal insurance society may be waived by custom acquiesced in by the society, said: “The acts and declarations evidencing the custom may be those of the society itself or those of its agent. And this is true even though the constitution of the order provides that the collecting [37] officer of the local organization has no power to waive the provisions of the constitution. As a matter of law, the knowledge of

the agent is the knowledge of the society. *Peterson v. Modern Woodmen of America*, 127 Wash. 412; 220 Pac. 809.

“Too, it is the rule that the existence of a waiver depends upon the effect of the insurer’s actions upon the insured, not upon what the insured intends. If the conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continues despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture. *Morgan v. Northwestern National Life Co.*, 42 Wash. 10; 84 Pac. 412.”

There can be no question under the evidence here but that the defendant had actual knowledge of the times of payments by the insured as the checks for payment of monthly installments were made directly payable to the defendant and forwarded to it.

As to the contention that under the contract of insurance no provision is made for a trustee in trust to be beneficiary and the change of beneficiary was not made in accordance with its terms it is sufficient to say that it appears that Eric A. Krussman made the request in writing to the defendant’s financial secretary to change the beneficiary from Marian Alice Krussman to his son Harry E. Krussman who was to distribute the proceeds as stated, and the terms of the trust are set forth in a letter from Eric A. Krussman to his son and accepted.

would not defeat the right of the plaintiff to sue and recover on the policy.

The views thus expressed under the evidence, the defendant waived the forfeiture of the certificate of insurance and the plaintiff is entitled to judgment as prayed for, and costs.

[Endorsed]: Filed Dec. 5, 1941. [38]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly to be heard on the 22nd day of October, 1941, before the Hon. Charles C. Cavanah, District Judge, sitting without a jury, trial by jury having been waived by failure to make demand therefor. T. D. Jones and Ralph H. Jones appeared for and on behalf of the plaintiff, and A. L. Merrill, R. D. Merrill and Rainey T. Wells appeared for and on behalf of the defendant. Evidence was introduced by and on behalf of the plaintiff and the defendant upon the issues raised by the pleadings filed in this cause. At the close of the evidence oral arguments were made by the respective parties and briefs were received from said parties and duly considered by the Court, and the Court being now fully advised in the law and the premises makes and enters the following:

FINDINGS OF FACT

I.

That the defendant now is, and ever since September 29, 1935 and for some time prior thereto has been a Fraternal Beneficiary Association incorporated under and by virtue of the laws of the State of Nebraska. That said defendant has a ritualistic form of work and representative form of government without capital stock and transacts business without profit for the sole benefit of its members and their beneficiaries. That the defendant qualified to do business in the State of Idaho as a foreign corporation, [39] doing business of insuring the lives of its members, and that ever since the time first aforesaid until about the 4th day of August, 1937, the said defendant was doing business under the corporate name of Pacific Woodmen Life Association, and that on or about said last mentioned date the Articles of Incorporation of said defendant were amended changing its corporate name from Pacific Woodmen Life Association to Omaha Woodmen Life Insurance Society, and that ever since about the 4th day of August, 1937, the said defendant has been doing business under the corporate name of said Omaha Woodmen Life Insurance Society.

II.

That on the 30th day of September, 1935, one Eric A. Krussman was received into defendant corporation as a member thereof while it was doing

business under the corporate name of Pacific Woodmen Life Association under a ten-year term insurance certificate (Plaintiff's Exhibit 2), and remained such member in good standing and entitled to all the privileges and benefits appurtenant to said membership until his death which occurred on August 2, 1940.

That at the time the said Eric A. Krussman was so received as a member of said defendant corporation, the said defendant then doing business under the corporate name of Pacific Woodmen Life Association, duly executed and delivered to him a certain written and printed certificate bearing date the 30th day of September, 1935 (Plaintiff's Exhibit 2) and thereby insured the life of the said Eric A. Krussman in the sum of five thousand and no/100 dollars, which said certificate of insurance was in full force and effect at the time of his death.

III.

That on May 29, 1940, the beneficiary named in said certificate was changed to Marian Alice Krussman, the insured's daughter, and her name was endorsed on said certificate of insurance; and that thereafter on June 17, 1940, the insured Eric A. Krussman, made a request in writing to Basil Fleming, [40] Financial Secretary of the defendant, at Pocatello, Idaho, to change the beneficiary from Marian Alice Krussman to his son, Harry E. Krussman (Plaintiff's Exhibit No. 15) who was to

distribute the proceeds of the certificate as Trustee, as follows: the sum of \$4000.00 to Marian Alice Krussman, daughter of Insured, and \$700.00 to Beatrice Krussman Ginzle, daughter of insured, and \$300.00 for burial expenses. The terms of the trust are set forth in a letter from Eric A. Krussman to his son, Harry E. Krussman, dated June 20, 1940. That the said Harry E. Krussman, who was one and the same person as H. E. Krussman, accepted the terms of the trust as recited in a letter to Eric Krussman from H. E. Krussman under date of June 25, 1940 (Plaintiff's Exhibit No. 16).

That Section 72 of the Constitution, Laws and By-laws of the defendant (Exhibits 3, 4 and 5) among other things provides that a person desiring to change the beneficiary or beneficiaries named in a certificate may do so by filing written request properly witnessed, giving the name or names of such new beneficiary or beneficiaries, and delivering same to the Financial Secretary of the camp for transmission to the Secretary of the defendant. It further provides that no change of beneficiary shall be allowed or binding on the defendant or any of the beneficiaries, which is not requested in writing more than 24 hours before the date of death of said member. The court finds that the request to change the beneficiary (Plaintiff's Exhibit 15) was delivered to said Basil Fleming, Financial Secretary, in the latter part of June 1940 and that Eric A. Krussman died on August 2, 1940.

IV.

That the said Eric A. Krussman, during his lifetime, fully complied with the requirements of the Articles of Incorporation of the Constitution and Laws of the defendant, and with all its regulations and by-laws in force at the time of the issuance of said certificate and thereafter adopted, and performed all of the agreements and conditions of said certificate (Plaintiff's [41] Exhibit No. 2), and the Constitution, Laws and By-Laws of the defendant (Plaintiff's Exhibits No. 3, 4 and 5) on his part to be performed, except the provisions thereof requiring the making of monthly payments of installments on or before the last day of the month in which they became due. But the Court finds that all payments of monthly installments on said certificate from May 1936 until the date of the death of the insured, were made by checks drawn by Eric A. Krussman or someone in his behalf and made payable to the defendant; that said checks were delivered to Bazil Fleming, Financial Secretary of the defendant, and transmitted to the defendant, and were received and duly endorsed by the defendant, and the proceeds thereof applied by defendant in payment of overdue installments on said certificate of insurance, with the exception of two checks which were made payable directly to Bazil Fleming, Financial Secretary, and the proceeds thereof transmitted to the defendant and applied by the defendant in payment of overdue installments on said certificate of insurance. The Court further finds that one of the

checks made payable directly to Basil Fleming (Plaintiff's Exhibit G-5) was dated November 28, 1936, and was applied by defendant in payment of the installment for the month of October, 1936; and that the other check made payable directly to Basil Fleming (Plaintiff's Exhibit G-6) was dated December 14, 1936 and the proceeds thereof applied by the defendant in payment of the installment on said certificate for the month of November, 1936.

V.

The Court further finds that no payment after September, 1936, was made by Eric A. Krussman during the current month, except the payment for August, 1940, which payment was made the day before the death of said insured; and that in every instance since September, 1936, payment was made by the insured and accepted by the defendant in the month following the month in which payment of installment was due, and was applied by the defendant [42] for the installment for the previous month, excepting that in three or four instances the insured made payment for two previous months, which was accepted by defendant and applied upon payments of installments due for two previous months (Plaintiff's Exhibits No. 19 and G-1 to G-49 inclusive, and No. 12), and excepting the check dated August 1, 1940. That Basil Fleming, the Financial Secretary of defendant was in the habit of calling at the residence of the insured for

collection of said checks, and the court finds that the defendant had actual knowledge of the time each installment was paid for a period of nearly four years and had actual knowledge that since September 1936 none of the monthly installments were paid before the end of the month in which they became due, and that at the time of the death of the insured all installments had been paid upon said certificate; that the monthly rate of installment on said certificate was \$11.70, and that whenever monthly payment in excess of \$11.70 was made, the amount of such excess was credited back to Bazil Fleming, Financial Secretary of Camp No. 7 at Pocatello, Idaho to be applied on Mr. Eric A. Krussman's local camp dues.

VI.

The court finds that the defendant forwarded a form letter to the insured dated February 25, 1938 (Exhibit F-1) enclosing refund check representing distribution of gains and savings on insured's certificate, and on February 25, 1939, forwarded form letter (Exhibit E) to the insured enclosing check (Exhibit F) stating among other things that "on account of economies effected in 1938 we are happily in position to make another refund to each of our members of over two years standing"; and on February 1, 1940 forwarded form letter (Exhibit C) with which was enclosed check for distribution of gains and savings (Exhibit D) in which letter it was stated among other things:

“Our board of directors has authorized the payment of a cash refund for the year 1939 upon certificates in force for two or more years, and check for yours is herewith enclosed.”

The court further finds that these refund checks were made to all [43] members who had been continuously in membership for two years or more and who were in good standing at the end of the year for which the checks were issued. The court finds that such letters, together with the checks enclosed, recognized that the insured was in good standing, and that the acts and conduct of the defendant and course of dealing on the part of defendant led the insured to believe, and he did believe and understand as a reasonable man that prompt payment of the monthly installments would not be required but that they would be received and accepted after due, and that insured would be considered in good standing, and the court finds that the insured was not suspended.

VII.

The court finds that there is no evidence in the record that any notice or warning of any kind was ever given to the insured that his certificate was not in full force and effect.

VIII.

The court finds that Eric A. Krussman died on August 2, 1940 and that proof of death was received by the Company on August 8, 1940; that on

November 14, 1940 beneficiary's claim for insurance was rejected by letter from defendant to plaintiff (Plaintiff's Exhibit 10) with which letter a check or refund warrant payable to plaintiff in the sum of \$153.25 was enclosed, which sum was to cover installments paid by insured from July 1939 to 1940 inclusive, less \$10.55 paid to insured in February 1940 as gains and savings apportionable to the certificate sued upon in this action, and that such tender was rejected. The court finds that more than nine months thereafter defendant made a new tender to plaintiff in the sum of \$294.80 to cover all monthly installments paid by insured subsequent to July 1, 1938, less the amount of distribution of gains and savings paid on said certificate by checks in 1939 and 1940. This tender was rejected.

IX.

The court finds that said certificate issued to Eric A. Krussman contained among other things, the following express provision: [44]

“This certificate is issued and accepted subject to all the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The Articles of Incorporation and the Constitution, Laws and By-Laws of the Association, and all Amendments to each thereof which may be made hereafter; the Application for membership signed by the applicant

and approved by the Medical Director of this Association, and when a medical examination is made, the statements of the Applicant to the Medical Examiner as recorded by him and signed by the Applicant, and this Certificate shall constitute the agreement between the Association and the Member, and copies of the same, certified by the Secretary of the Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the Articles of Incorporation, or the Constitution, Laws and By-Laws of the Association made subsequent to the issuance of this Certificate, shall bind the member named herein and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments were in full force at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the Member, this Certificate shall be null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the Member, or other act by any Camp officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract."

X.

That the application referred to in said certificate, among other things, provides:

“I hereby certify, agree and warrant that I am of sound bodily health and mind; that I am temperate in habits and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the Association now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any Beneficiary Certificate that may be issued to me by the Sovereign Camp of the Pacific Woodmen Life Association, whether printed or referred to therein or not.

“I hereby waive the attaching of copies thereof to said Certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto; and I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure.” [45]

XI.

The Court finds that Section 63 of the Constitution; Laws and By-Laws of said defendant provides:

“Sec. 63 (a). In order to accumulate and maintain funds for the payment of benefits stipulated in Beneficiaries Certificates held by the Members of this Association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Association, every member of this Association shall pay to the Financial Secretary of his Camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these Laws or by the provisions of his Beneficiary Certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues, as may be required by the By-Laws of his Camp.

“(b) If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his Beneficiary Certificate shall be void, the Contract between such person and the Association shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Association as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said

Member from the delivery of his Certificate to the date of his suspension. * * *”

XII.

The court finds that Section 65 of the Constitution, Laws and By-Laws effective from September 1, 1935 to September 1, 1937, (Exhibit No. 3) provided as follows:

“Any person who has become suspended because of the non-payment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed

knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments of assessments in case such person is not in good health shall not make such person a member or entitled him or his beneficiary or beneficiaries to any rights whatever." [46]

That said Section 65 was amended to take effect as of September 1, 1937 and as thus amended provided:

"Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

"Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making pay-

ments shall be received and retained without waiving any of the provisions of this Section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

And that said Section 65 was again amended to take effect as of September 1, 1939, and as thus amended provided:

"Any person who has become suspended by his failure to pay any monthly installment may, if living, within fifteen days from the date of his suspension again become a member of the Society by the payment of the delinquent installment to the Financial Secretary of the Camp. After fifteen days and within three months from the date of his suspension he may again become a member of the Society by the payment of the delinquent installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

Whenever payments are made by a person who has been suspended for more than fifteen

days, for the purpose of again becoming a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended by not making payments, as well as all subsequent payments by him made, shall be received and retained by the Society without waiving any of the provisions of this section, or of these laws, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. Provided, that the receipt and retention of such payments, in case such person is not in good health, or does not remain in good health for thirty days thereafter, shall not make such person again a member of the Society, nor entitle him or [47] his beneficiary or beneficiaries to any rights whatever."

XIII.

The court finds that Section 66 of the Constitution, Laws and By-Laws of defendant provides:

"Section 66 (a) The retention by the Association of any installment or assessment paid

by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or any estoppel upon the Association.

“(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment or assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the Certificate shall be null and void.”

XIV.

The Court finds that Section 82 of the Constitution, Laws and By-Laws of the defendant provides among other things:

“Sec. 82 (a). No officer, employee or agent of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions upon which Beneficiary Certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these laws, nor shall any custom on the part of any Camp or any number of Camps,—with or without the knowledge of any officer of such Association—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every Beneficiary Cer-

tificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these Laws by the Association or an estoppel of this Association.”

XV.

The Court finds that Section 107 (g) of the Constitution, Laws and By-Laws of the defendant, adopted June, 1939, which section is substantially the same as the provisions of Section 109 (g) of the 1935 Constitution, Laws and By-Laws, provides:

“The financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such acts.” [48]

XVI.

The court finds that the above quoted provisions of the Constitution, Laws and By-Laws of the defendant (Exhibits 3, 4 and 5) were in full force and effect when the said certificate was written, with the exception of the amendments to Section 65, and became a part of said contract and remained such during the life thereof, and that the amendments

to Section 65 became effective September 1, 1937, and September 1, 1939 respectively.

XVII.

That under the terms of the contract the said Eric A. Krussman agreed to pay the assessments and dues, and installments of \$11.70 per month on or before the last day of the month in which said installments became due and if the same were not so paid the certificate would automatically terminate and become void and the member suspended; but finds that the insured was not suspended nor was his certificate null and void, and finds that Eric A. Krussman failed to pay the June 1938 installment on or before the last of June, 1938. The court finds that on July 19, 1938 a check was drawn by the insured in favor of the defendant which was received by the defendant on July 21, 1938 and endorsed and accepted by it and the proceeds applied for the June 1938 installment; that the same was received and accepted by the defendant for the purpose of continuing in force the insurance certificate (Exhibit 2), and the court finds that it is not true that after June 1938 every or any of the payments made by insured and received by the defendant were made after the certificate terminated and became void and the member suspended.

XVIII.

The court finds that on or about July 22, 1938 the said Eric A. Krussman suffered a stroke from which he never fully recovered and that thereafter

he was in a condition of ill health until the date of his death, and that there was no concealment of [49] the illness of the said insured. That Bazil Fleming, the Financial Secretary, agent of the defendant, had actual knowledge of Krussman's condition from about the time of his stroke in July 1938 until the date of insured's death. That Section 105 (a) and (b) of the 1935 and 1937 Constitution, laws and by-laws (Exhibits 3 and 4) and Section 103 (a) and (b) of the 1939 Constitution, Laws and By-Laws (Exhibit 5) contain the same provisions; and that Section 111 of the 1935 and 1937 Constitution Laws and By-Laws, contains the same provisions as Section 109 of the 1939 Constitution, Laws and By-Laws and that said provisions were in effect from the time the certificate was issued to Mr. Krussman up to the date of his death, said sections reading as follows:

“Sec. 103 (a) The President and Secretary of the Society shall appoint and may remove at will a Financial Secretary for each Camp, who shall be paid at least the same compensation per member per month by the Camp as has heretofore been paid to the Clerk by the local Camp.

“(b) The Financial Secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the Camp dues and the Sovereign Camp fund payments and monthly installments

thereof, and shall monthly pay the Camp dues so collected to the Banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the Society to the Secretary of the Society at the headquarters of the Society as provided for in Section 109.”

“Sec. 109. On or before the fifth day of every month the Financial Secretary of each Camp shall remit all the Sovereign Camp funds in his hands and all other funds due the Society to the Secretary of the Society. Such amounts shall be remitted in money order, certified check, bank cashier’s check, or bank draft with exchange, payable to the order of the Treasurer. Accompanying such remittances, the Financial Secretary shall also forward such detailed statement of the standing of the members in the Camp as shall be required for the information of the Secretary of the Society, upon blanks furnished for that purpose.”

That the said Bazil Fleming was the agent of the defendant and acquired knowledge of Krussman’s condition while he was acting within the scope of his powers and duties, and it is presumed that he performed his duty as required by the above quoted sections, and that such knowledge was communicated to the defen- [50] dant, and if not, would be imputed to the defendant.

XIX.

That during the whole of the time that Krussman was in ill health and from the time of the issuance of his certificate of insurance the defendant treated him as a member in good standing and that none of said payments were made for the purpose of reinstatement, and that defendant waived prompt payment of monthly installments, and that none of said payments made to the defendant and retained by it was a guarantee, representation or warranty that the said insured was in fact in good health or that he would remain in good health for any period of time.

XX.

That defendant, in accepting the payments after the end of the month in which they became due as above set out, did not act upon any guarantee, representation or warranty that the said Krussman was in good health, and there was no false or untrue warranty, and finds that knowledge had been imputed to the defendant prior to the death of Krussman that said Krussman was not in good health, and finds that retention of payments made after default as herein set out and the fact that the insured had been informed by the defendant during the years 1938, 1939 and 1940 as above set out, that he was in good standing, and the defendant's course of dealing constituted a waiver of the right of the defendant to insist upon prompt payment as in the contract provided and of the right to forfeit or terminate said contract, and could and

did constitute an estoppel on the part of defendant to resist payment under the certificate, and finds that said certificate was not void of or no force or effect after the 22nd day of July 1938 or at any time, but finds that the same was in full force and effect during said time and at the date of the death of the said Eric A. Krussman. [51]

XXI.

The court finds that knowledge on the part of the Financial Secretary, Basil Fleming, of the health of Eric A. Krussman during any of the time when payments were not made within the month in which they became due, was material, and finds that the receipt of the checks by the defendant corporation and the application of the same to overdue monthly installments, and the course of defendant's dealing with the insured, could and did constitute a waiver of the provisions of said contract, and could and did constitute an estoppel of defendant in resisting payment herein, and that the tender made by the said defendant as set out in Paragraph VIII of these findings was not made upon the erroneous assumption that Eric A. Krussman was in good health.

XXII.

The ever since the delivery of the request to the said Financial Secretary (Plaintiff's Exhibit 15) set out in Paragraph III of these findings, which request was delivered more than 24 hours prior to the insured's death, the plaintiff was and now

is the beneficiary under said certificate as trustee of an express trust, and that this action is brought by the plaintiff as such trustee, and that ever since the death of said insured there has been and still is in the treasury of said defendant a sufficient sum to pay the plaintiff's claim and all just claims against the defendant. And the court finds that on the 8th day of August, 1940, more than 90 days before the commencement of this action, the plaintiff furnished the defendant proof of death and performed all the conditions of said certificate and of the Constitution and Laws and By-Laws of the defendant required to be performed on his part, and that the defendant has refused to pay the amount due the plaintiff under said certificate, or any part thereof, and that no part due under said certificate has been paid and that the sum of \$5,000 is now due thereon from the defendant to the plaintiff together with interest thereon at the [52] rate of 6% per annum from the 8th day of August, 1940, and costs of this action.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court duly finds and concludes as a matter of law:

1. That the complaint in this action states facts sufficient to constitute a cause of action against the defendant.

2. That the delivery of the request (Exhibit 15) to Bazil Fleming, Financial Secretary, was a compliance with the Constitution, Laws and By-Laws

of the defendant for change of beneficiary from Marian Alice Krussman to the plaintiff Harry E. Krussman, (sometimes known as H. E. Krussman) and that the plaintiff herein is the real party in interest and that this action has been brought by the real party in interest.

3. That all overdue monthly payments of installments made by the insured to the defendant were made for the purpose of continuing the certificate in full force and effect, and none of the same were made and none of the same were made by the insured for the purpose of reinstatement. That the defendant at all times treated the insured as a member in good standing. That the acts and conduct of the defendant and its course of dealing with the insured, including the forwarding of letters enclosing refund checks for gains and savings apportionable to his certificate and informing him that he was a member in good standing, led the insured to believe and he did believe and understand as a reasonable man that prompt payment of installments would not be required but that they would be received, and accepted after they were due, and that insured would be considered in good standing and that he could make monthly payments of installments after the time specified in the contract of insurance, and avoid forfeiture or suspension, and that by [53] said acts, conduct and custom, the defendant waived prompt payment and strict performance of the provisions of its certificate and its constitution laws

and by-laws, and the said defendant is now estopped from invoking the forfeiture of said contract for failure to make prompt payment.

4. That Section 40-2331 I. C. A., providing that the constitution and laws of a society (such as the defendant) may provide that no subordinate body or any of its subordinate officers and members shall have power or authority to waive any of the provisions of the laws and constitution of the society, does not prevent the society itself from waiving the provisions of its constitution and laws, nor does said section authorize or empower the society to change the rules of agency.

5. That Bazil Fleming was the agent of the defendant and it is presumed that he performed his duties and communicated to the defendant his knowledge of Krussman's ill health which he as agent acquired within the scope of his powers and duties, and that if he failed to advise his principal of such illness, the knowledge of such illness on the part of the financial secretary which he acquired while acting as agent of the defendant would be imputed to the defendant.

6. That the defendant has power and authority to waive the provisions of its constitution, laws and by-laws.

7. That the said certificate of insurance was not forfeited and that insured was a member in good standing of the defendant company at the time of his death.

8. That the plaintiff is entitled to judgment

against the defendant for the sum of \$5,000 together with interest thereon from the 8th day of August, 1940, at the rate of 6% per annum, and costs. Let judgment be entered accordingly.

Dated this 23rd day of December, 1941.

CHARLES C. CAVANAH,
United States District Judge.

[54]

Service is hereby accepted and acknowledged of the proposed Findings of Fact and Conclusions of Law and judgment by receipt of the foregoing copies thereof this 11th day of December, 1941.

A. L. MERRILL,
R. D. MERRILL,
RAINEY T. WELLS,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 23, 1941. [55]

In the District Court of the United States, for the
District of Idaho, Eastern Division.

HARRY E. KRUSSMAN, as Trustee of an
Express Trust, Plaintiff,

vs.

OMAHA WOODMEN LIFE INSURANCE
SOCIETY, a corporation, Defendant.

JUDGMENT

This cause came on to be heard on October 22, 1941, at Pocatello, Idaho, before the Court without

the intervention of a jury. As the conclusion of the trial and presentation of oral argument the Court reserved decision and took the case under advisement. Subsequent thereto briefs were filed on behalf of the respective parties, and the Court having made its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed That the plaintiff, Harry E. Krussman, as Trustee of an Express Trust, do have and recover judgment against the defendant, Omaha Woodmen Life Insurance Society, a corporation, in the sum of \$5,000.00, together with interest thereon at the rate of six per cent per annum from the 8th day of August, 1941, until paid, and plaintiffs costs taxed at \$29.60.

Signed and entered this 23rd day of December, 1941.

CHARLES C. CAVANAH,
United States District Judge.

[Endorsed]: Filed December 23, 1941. [56]

[Title of District Court and Cause.]

**OBJECTIONS TO FINDINGS, CONCLUSIONS
OF LAW, AND JUDGMENT, AND MOTION
TO STRIKE, AMEND AND SUBSTITUTE.**

Comes now the defendant and objects generally and specifically to the Findings of Fact and the Conclusions of Law drawn therefrom, and moves the Court to amend said Findings, make additional

Findings, and different Conclusions, and enter judgment in favor of the defendant.

Without waiving any right whatsoever that may be possessed by the defendant in respect to challenging any Finding or Conclusion, but expressly reserving to itself all rights under the Rules of Civil Procedure and under the law, the defendant submits the following specific objections and motions, to-wit:

I.

Defendant moves to strike from Finding No. 1 the following: "That the defendant qualified to do business in the State of Idaho as a foreign corporation, doing business of insuring the lives of its members" and to insert in lieu thereof the following: "That the defendant qualified under the laws of the State of Idaho as a fraternal benefit society and insured the lives of some of its members as part of its fraternal functions."

II.

The defendant objects to and moves to strike from Finding [57] No. II the recitation that Eric A. Krussman "remained such member in good standing and entitled to all of the privileges and benefits appurtenant to said membership until his death, which occurred on August 2, 1940," and also that recitation touching the benefit certificate, as follows: "which said certificate of insurance was in full force and effect at the time of his death," upon the ground and for the reason that in each instance

said Finding is not supported by any competent evidence, but on the contrary the undisputed evidence is that the said Eric A. Krussman was suspended from membership for failure to pay during the month of June, 1938, the installment which became due that month and his certificate became void and was never thereafter reinstated.

III.

The defendant objects to Finding No. IV upon the ground that it is not a Finding of an ultimate fact and is not in accordance with the provisions of the Constitution, Laws and By-Laws of the defendant, and is contrary to the evidence introduced, more particularly in that the said Eric A. Krussman became suspended as a member of the Society of the defendant by reason of failure to pay, and his Certificate thereupon became void and was never thereafter reinstated.

IV.

Defendant objects to and moves to strike the last full sentence of Finding No. V, beginning with the words "That Basil Fleming, the financial secretary of the defendant, was in the habit of calling at the residence of the insured for collection of checks," and ending with said paragraph, upon the ground that the matters therein recited are immaterial under the issues in this case, and that such information, [58] if any, as Basil Fleming may have acquired was not imputed to the defendant, and

that the delinquent payments tendered were necessarily accepted under the terms of the contract and not otherwise.

V.

The defendant objects to and moves to strike all of Finding No. VI, which deals with certain form letters dated February 25, 1939, and February 1, 1940, and the various conclusions attempted to be drawn therefrom upon the ground and for the reason that the matters stated in said Findings are immaterial for any purpose and do not constitute any reason for judgment in favor of the plaintiff, particularly because there is no evidence showing or tending to show that the officer of the company who signed and forwarded said letters, or any other officer of the defendant having authority to bind said defendant, knew said certificate was void or had any knowledge of any kind or character at the time of sending said letters and refunds, that said Eric A. Krussman was not in good health or that he had not been and could not have been reinstated by reason of ill health.

VI.

The defendant objects to and moves to strike from said Findings all of Paragraph Numbered VII, reading as follows:

“The Court finds that there is no evidence in the record that any notice or warning of any kind was ever given to the insured that his Certificate was not in full force and effect.”

for the reason that the same is not within the issues of said cause and is immaterial for any purpose and, if true, would not constitute any reason for judgment in favor of the plaintiff, more particularly because the contract with the member [59] did not require notice of suspension but pursuant to Section 63 of the Constitution, Laws and By-Laws, suspension is automatic and self-operative and the member is charged with knowledge of such provisions.

VII.

Defendant objects to and moves to strike from Finding No. XVII the following:

“but finds that the insured was not suspended, nor was his certificate null and void,”

and also that portion of said Finding reading as follows:

“and the proceeds applied for the June, 1938 installment; that the same was received and accepted by the defendant for the purpose of continuing in force the insurance certificate (Exhibit 2), and the Court finds that it is not true that after June, 1938, every or any of the payments made by the insured and received by the defendant were made after the Certificate terminated and became void, and the member suspended,”

for the reason that said matters so sought to be stricken are not supported by the evidence nor in harmony therewith. In this respect defendant moves

said Finding be amended by substituting in lieu of the last quoted provisions, the following:

“and the proceeds were retained by defendant pursuant to the terms of said contract for the purpose of again making the said Eric A. Krussman a member, if he was at said time in good health and remained in good health for a period of 30 days thereafter, and each and every payment made by the insured after June, 1938, was made for the purpose of reinstatement and accepted and retained by the defendant pursuant to Sections 63 (b), 65 and 66 (a) and (b) of the Constitution, Laws and By-Laws.”

VIII.

The defendant objects to and moves to strike from Finding No. XVIII the following: [60]

“That Basil Fleming, the Financial Secretary, agent of the defendant, had actual knowledge of Krussman’s condition from about the date of insured’s death. * * * That the said Basil Fleming was the agent of the defendant and acquired knowledge of Krussman’s condition while he was acting within the scope of his powers and duties, and it is presumed that he performed his duty as required by the above quoted sections, and that such knowledge was communicated to the defendant, and if not, would be imputed to the defendant,”

upon the ground and for the reason that said statements are contrary to the terms and conditions of

the contract, and particularly Sections 65, 66, 82 (a) and 109 (g), of the Constitution, Laws and By-Laws, and upon the further ground that said purported Finding is against the law.

Defendant further objects to and moves to strike from said Finding No. XVIII that portion thereof beginning with the words "That Section 105 (a) and (b)," and ending with the quotation from Section 109 of the Constitution, Laws and By-Laws with the words "upon blanks furnished for that purpose," for the reason that the same is wholly immaterial and surplusage.

IX.

Defendant objects to and moves to strike all of Finding No. XIX upon the ground and for the reason that the same is not supported by the evidence, but is contrary thereto and to the provisions of the contract, more particularly in that the payment of delinquent installments and their acceptance by the defendant was for purposes of reinstatement as provided in sections of the Constitution, Laws and By-Laws numbered 65, 66 (a) and (b) and such acceptance did not and could not have constituted a waiver of any rights under the contract, but the payment thereof did constitute a warranty of good health. [61]

X.

Defendant objects to and moves to strike Finding No. XX upon the ground and for the reason that the same is not supported by the evidence,

but is contrary thereto and is against the law and fails to recognize the provisions of the contract respecting the warranty of good health and the necessity on the part of the defendant to accept tendered payments by one in default, which payments come with the warranty of good health which warranty in this case was false.

XI.

The defendant objects to and moves to strike all of Finding No. XXI upon the ground and for the reason that the same is not supported by the evidence, but is contrary thereto, and more particularly in that it is contrary to the provisions of the contract as expressed in Sections 65, 66, 82, 109 (g) of the Constitution, Laws and By-Laws.

XII.

Defendant objects to and moves to strike from Finding No. XXII the following: "that the sum of \$5,000 is now due thereon from the defendant to the plaintiff, together with interest thereon at the rate of 6% per annum from the 8th day of August, 1940, and costs of this action," upon the ground and for the reason that the same does not constitute a Finding of Fact and is an erroneous conclusion and is not supported by the evidence in said cause, but is contrary thereto.

XIII.

Defendant objects to and moves to strike the Conclusions of Law Numbered 1 to 8 inclusive,

upon the ground and for the reason that they are not supported by the evidence and the facts proved thereby, but are contrary thereto and against the law. Defendant further moves that Conclusions of Law be made [62] and entered in conformance with the testimony adduced resolving the controversy in favor of the defendant and against the plaintiff.

XIV.

Defendant moves the court to make and enter the following additional Findings of Fact, to-wit:

Defendant's Requested Finding No. I.

That the said Eric A. Krussman did not pay the installment due for the month of June, 1938, during the month for which it became due and thereby became suspended as a member and the beneficiary certificate referred to herein became and was void and the contract between the defendant and Eric A. Krussman was terminated; that the payment tendered by check, dated July 19, 1938, for the said June installment was accepted by the defendant pursuant to the Constitution, Laws and By-Laws of said society for the purpose of reinstatement under the conditions recited in said contract and the tender of said payment on behalf of the said Eric A. Krussman was a warrant that he, at the time thereof, was in good health and that he would remain in good health for thirty days after the attempt to become thus reinstated. That said warranty failed and the tender was rendered ineffective for

reinstatement because the said Eric A. Krussman did not remain in good health for a period of thirty days thereafter, but on the contrary, on the 22nd day of June, 1938, he suffered a paralytic stroke which rendered him helpless for a period of several months and he was never again in good health from the 22nd day of July, 1938, until the date of his death on August 2, 1940, and was at no time during said period of time in a condition of health that would have permitted him to have fulfilled any warranty of good health or permit the reinstatement of said certificate. That each month thereafter, up to and including the date of his death, each installment tendered the defendant by or on behalf of Eric A. Krussman was a delinquent installment for the preceding month and that each installment was accepted by the company pursuant to the Constitution, Laws and By-Laws, and particularly Sections 65 and 66, and that in each instance the warranty accompanying said tender was false, and the acceptance of said installments did not constitute a reinstatement, but said certificate remained void and of no force or effect and the said Eric A. Krussman was during all of said time suspended, and said certificate void and was void on the date of his death. [63]

Defendant's Requested Finding No. II.

That there was no requirement on the part of the defendant to give Notice of Suspension

to Eric A. Krussman, but that the suspension was automatic and self-operative upon the failure to pay the installment for the month within which it became due; that the said Eric A. Krussman was charged with knowledge of all of the terms and conditions of said contract, including the Constitution, Laws and By-Laws and knew or should have known that no notice of suspension was required, but that he was suspended and his certificate terminated by reason of his failure to make said payments during the month for which the same became due.

Defendant's Requested Finding No. III.

That from the date the said Eric A. Krussman became ill until after his death, neither the secretary nor any officer of the defendant had any knowledge whatever that the said Eric A. Krussman was not in good health, but on the contrary assumed and had a right to assume that he was in good health and all delinquent installments were tendered and received pursuant to the terms of the contract and not otherwise, and the Secretary and all other officers of said defendant relied and had a right to rely upon the warranty of good health.

Defendant's Requested Finding No. IV.

That under the Constitution, Laws and By-Laws the defendant was required to accept the tender of past due installments made by one

to whom a certificate had theretofore been issued, if made within ninety days from date of suspension, but that the acceptance and retention of said delinquent installments did not constitute a waiver of the right to insist that the member be in good health and remain in good health for a period of thirty days thereafter, and the acceptance and retention of said installments in this case did not constitute an estoppel or waiver of the defendant to rely upon the suspension of said member by the non-payment of said installments when the warranty made by the payment of said installment was false, and the member was not in good health. [64]

Defendant's Requested Finding No. V.

That the Financial Secretary, Basil A. Fleming, did not and could not waive any of the provisions of the Constitution, Laws and By-Laws and any information which he may have obtained touching the health of Eric A. Krussman, if any, was not imputed to the defendant and did not and could not constitute a waiver of any of the provisions of said contract, nor prevent any certificate from becoming void for non-payment of current installments.

Defendant's Requested Finding No. VI.

That the defendant did not at any time, nor in any manner, waive any of the provisions of its contract and was at all times entitled to in-

sist upon punctual payment of all installments and entitled to rely upon the warranty of good health which the tender of a delinquent installment presented.

Defendant's Requested Finding No. VII.

That the defendant has tendered to the plaintiff herein the total sum of \$294.08, which said sum constitutes all of the delinquent installments paid to the defendant after the said Eric A. Krussman became suspended and in ill health; that said tender was refused by the plaintiff and has been kept good by the defendant.

The defendant further moves the Court that appropriate Conclusions of Law, based upon the foregoing proposed Findings, be duly made and entered herein, wherein it be concluded that the Certificate originally issued to Eric A. Krussman became and was void on the date of his death, and the plaintiff is not entitled to recover a judgment against the defendant herein and that the defendant recover its costs expended. [65]

Defendant objects to judgment being entered against it and moves that judgment be rendered in

its favor pursuant to said Findings and Conclusions.

Dated December 20, 1941.

A. L. MERRILL

R. D. MERRILL

Residing at: Pocatello, Idaho

RAINEY T. WELLS

(ALM)

Residing at: Omaha, Nebraska

Attorneys for Defendant

The foregoing objections to the Findings and Conclusions of Law and Judgment are overruled. Exception allowed.

Dec. 23rd, 1941.

CHARLES C. CAVANAH

District Judge

Service of foregoing by receipt of copy acknowledged this 20th day of December, 1941.

T. D. JONES

RALPH H. JONES

Residing at: Pocatello, Idaho

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 22, 1941. [66]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Omaha Woodmen Life Insurance Society, a corporation, the above

named defendant, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled Court and Cause on the 23rd day of December, 1941, which said Judgment was in favor of plaintiff above named and against the defendant.

Dated this 30th day of January, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant

Residing at Omaha, Nebraska

[Endorsed] Filed January 31, 1942. [67]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Omaha Woodmen Life Insurance Society, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound to Harry E. Krussman, as Trustee of an Express Trust, the

plaintiff and appellee in the above cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our Successors and Assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, 1942.

Whereas, on the 23rd day of December, 1941, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit depending in that Court wherein Harry E. Krussman, as Trustee of an Express Trust, was plaintiff, and Omaha Woodmen Life Insurance Society, a corporation, was defendant, a judgment was rendered against said defendant in the sum of Five Thousand (\$5,000.00) Dollars, with interest and costs, and said defendant having filed in the office of the Clerk of said District Court a Notice of Appeal to the United States [68] Circuit Court of Appeals for the Ninth Circuit:

Now, the condition of this obligation is such, that if the said Omaha Woodmen Life Insurance Society, a corporation, the appellant, shall prosecute said appeal and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the Judgment

be modified, then the above obligation is void, otherwise to remain in full force and effect.

OMAHA WOODMEN LIFE
INSURANCE SOCIETY

By A. L. MERRILL

One of the Attorneys of
Record

Residing at Pocatello, Idaho,
Principal

(Seal)

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By E. P. CARR

Its Attorney in Fact

Surety

T. F. TERRELL

Resident Agent

[Endorsed]: Filed Jan. 31, 1942. [69]

[Title of District Court and Cause.]

PETITION FOR APPROVAL OF SUPER-
SEDEAS AND STAY ON APPEAL

Comes now the Omaha Woodmen Life Insurance Society, a corporation, the above named defendant and appellant, and represents as follows:

That Judgment was entered in the above entitled Court and cause on the 23rd day of December, 1941, in favor of Harry E. Krussman, as Trustee of an Express Trust, the above named plaintiff, and

against the Omaha Woodmen Life Insurance Society, a corporation, defendant, for the sum of Five Thousand (\$5,000.00) Dollars, with interest thereon at 6% per annum from the 8th day of August, 1941, and costs taxed at Twenty-nine and 60/100 (\$29.60) Dollars; that said defendant has appealed from said Judgment to the United States Circuit Court for the Ninth Circuit, and desires the Court to fix the amount of a Supersedeas Bond, approve the form thereof, and also approve the United States Fidelity and Guaranty Company, a corporation, as Surety, and thereupon order a Stay of Proceedings according to law.

Now, therefore, Petitioner prays that the Court fix [70] the amount of said Supersedeas Bond, approve the form of Bond tendered herewith, and the Surety thereon and order a Stay according to law.

Dated this 30th day of January, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant

Residing at Omaha, Nebraska

[Endorsed]: Filed Jan. 31, 1942. [71]

[Title of District Court and Cause.]

ORDER APPROVING BOND AND GRANTING
STAY OF EXECUTION

The defendant, Omaha Woodmen Life Insurance Society, a corporation, having this day filed its Notice of Appeal from the Judgment rendered in the above entitled cause in favor of the plaintiff, Harry E. Krussman as Trustee of an Express Trust, and against the defendant, Omaha Woodmen Life Insurance Society, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an Order fixing the amount of a Supersedeas Bond and approving the proposed Surety and the form of said bond and granting said Stay of Proceedings:

Now, therefore, it is hereby ordered that the amount of said Supersedeas Bond be fixed in the sum of Six Thousand (\$6,000.00) Dollars, and the Bond tendered by the said Omaha Woodmen Life Insurance Society, a corporation, in said sum with the United States Fidelity and Guaranty Company, a corporation, as Surety, be and the same is hereby in all respects approved, and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed January 31, 1942. [72]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Omaha Woodmen Life Insurance Society, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho as Surety, are held and firmly bound unto Harry E. Krussman, as Trustee of an Express Trust, the above named plaintiff and Appellee, in the full and just sum of Six Thousand (\$6,000.00) Dollars cash, lawful money of the United States of America, to be paid to the said Harry E. Krussman, as Trustee of an Express Trust, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord Nineteen Hundred and Forty-two.

Whereas, lately at a District Court of the United States for the District of Idaho, Eastern Division, in a suit depending in said Court, between Harry E. Krussman as Trustee of an Express Trust, as plaintiff, and Omaha Woodmen Life Insurance Society, a corporation, as defendant, a Judgment was rendered against the said defendant, which Judg-

ment was entered in said Court on the 23rd day of December, 1941, for the sum of Five Thousand [73] (\$5,000.00) Dollars, with interest thereon at six percent (6%) per annum from August 8, 1941, and costs aggregating Twenty-nine and 60/100 (\$29.60) Dollars, and said Omaha Woodmen Life Insurance Society, a corporation, having filed in said Court a Notice of Appeal to reverse said Judgment in the aforesaid suit, on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California:

Now, the condition of the above obligation is such, that if the said Omaha Woodmen Life Insurance Society shall prosecute said Appeal to effect, and satisfy the said Judgment in full, together with costs, interest and damages for delay, if for any reason the Appeal is dismissed, or if Judgment is affirmed, and to satisfy in full such modification of the Judgment and such costs, interest and damages as the Appellate Court may adjudge and award, if said Appellant fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OMAHA WOODMEN LIFE
INSURANCE SOCIETY

By A. L. MERRILL

One of its Attorneys of Record
Residing at Pocatello, Idaho
Principal

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By E. P. CARR

Its Attorney in Fact

Surety

(Seal)

T. F. TERRELL

Resident Agent

The foregoing Bond is approved as to sufficiency, form and Surety, and is allowed as a Supersedeas this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge [74]

Power of Attorney

No. 56099

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint E. P. Carr of the City of Pocatello, County of Bannock, and State of Idaho, to be its true and lawful attorney in and for the County of Bannock in the State of Idaho, for the following purposes, to wit:

To sign its name as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding brought or pending within the aforesaid County of the said

State, or in any judicial action or proceedings over which a United States Court shall exercise jurisdiction.

It being the intention of this Power of Attorney to fully authorize and empower the said E. P. Carr to sign the name of said Company, and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said Company with the seal of the said Company thereto affixed, and the said Company hereby ratifies and confirms all and whatsoever the said E. P. Carr may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company, pursuant to a resolution of its Board of Directors, duly passed on the 11th day of January, A. D. 1904, (a certified copy of which is hereto annexed), has caused these presents to be sealed with its common and corporate seal, duly attested by its Vice-President and by its Assistant Secretary this 12th day of February, A. D. 1940.

UNITED STATES FIDELITY
AND GUARANTY COMPANY

[Seal] By M. BARRATT WALKER

Vice-President.

J. E. GITTINGS

Assistant Secretary [75]

State of Maryland,
City of Baltimore—ss.

On this 12th day of February, A. D. 1940, before me appears M. Barratt Walker, Vice-President of the United States Fidelity and Guaranty Company, of Baltimore City, Maryland, with whom I am personally acquainted, who, being by me duly sworn, says that he is the Vice-President of the United States Fidelity and Guaranty Company; that he knows the corporate seal of said corporation; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that he signed said instrument as Vice-President of said Company by like authority. The said M. Barratt Walker further says that he is acquainted with J. E. Gittings and knows him to be the Assistant Secretary of the United States Fidelity and Guaranty Company; that the signature of the said J. E. Gittings subscribed to said instrument, is the genuine handwriting of said J. E. Gittings, and was thereto subscribed by like order of the Board of Directors.

My Commission expires the first Monday in May, A. D. 1941.

(Signed) DOROTHY S. DREXEL

Notary Public

[Seal]

Copy of Resolution

That Whereas, it is often necessary in order to facilitate the business of the Company in States other than Maryland, and in the Territories and in Provinces of the Dominion of Canada and in the Colony of Newfoundland, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness.

Now, Therefore, Be It Resolved, that the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries be, and they are hereby authorized to appoint one or more persons residing in the States other than Maryland and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland, to sign the name of the Company as surety to and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding within any one of the said States or Territories, or Provinces of Canada, or Colony of Newfoundland, and that the said person [76] or persons so appointed are hereby authorized and empowered to sign the name of the Company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the Company to all intents and purposes, as if done by its duly authorized

officers, and the Company through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, W. E. Moore, an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to E. P. Carr of Pocatello, Idaho, authorizing and empowering him to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said power of attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of January, 1904, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company this 4th day of November, 1940.

[Seal]

W. O. MOORE

Assistant Secretary

[Endorsed]: Filed Jan. 31, 1942. [77]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

This matter came on for hearing at Pocatello, Idaho, on October 23, 1941, before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury.

Appearances.

Messrs. Jones, Pomeroy & Jones, Pocatello, Idaho
Attorneys for the plaintiff.

Messrs. Merrill & Merrill, Pocatello, Idaho, Attor-
neys for the Defendant. [78]

October 23, 1941

(Statement of case made by counsel)

Mr. Jones: We have the deposition of V. J. Pakes and I will state that it was agreed by counsel that either party may read any portion of the deposition they wish. There was a stipulation entered into for the taking of the deposition.

Mr. Merrill: We stipulated to take the deposition.

Mr. Jones: This is entitled, In the District Court of the United States, for the District of Idaho, Eastern Division. Harry E. Krussman, as Trustee of an express trust, plaintiff. vs. Omaha Woodmen Life Insurance Society A corporation Defendant. The deposition of V. J. Pakes, Assistant Secretary of the defendant of Omaha, Nebraska, was taken before me a Notary Public, in and for the County

of Douglas, State of Nebraska, on the 21st day of August 1941, at my office on the fourth floor, Insurance Building, Omaha, Nebraska, pursuant to the annexed stipulation on behalf of the plaintiff and defendant in the above entitled action pending in the above entitled Court. T. D. Jones, of Pocatello Idaho, appeared as Attorney for the plaintiff, and George Yeager, Assistant to the General Attorney for Defendant, of Omaha, Nebraska, appeared as attorney for the defendant. [80]

The following deposition was read, as follows: the questions read by Mr. T. D. Jones, answers by Mr. Ralph H. Jones.

V. J. PAKES

Being by me first duly sworn to tell the whole truth as hereinafter certified, testified as follows:

Direct Examination

Q. Mr. Pakes will you state your name, age, occupation?

A. V. J. Pakes, 68; I am assistant secretary of the Omaha Woodmen Life Insurance Society?

Q. Mr. Pakes what are your duties as Assistant Secretary of the defendant society?

A. Corresponding, accounting officer and custodian of all records.

Q. If you know, did Eric A. Krussman of Pocatello, Idaho, make application for membership in the society? A. He did.

(Deposition of V. J. Pakes.)

Q. Do you have that application in your records of the society? A. We have.

Q. Mr. Pakes, I hand you what purports to be an application of Mr. Krussman, and ask if it is his application for membership, marked Exhibit 1.

Mr. Jones: I wish to have this marked as exhibit “1” at this time. [81]

PLAINTIFF’S EXHIBIT 1.

“PACIFIC WOODMEN LIFE ASSOCIATION
PHYSICIAN’S REPORT ON EXAMINATION

* * * * * * *

“1. Name and residence of applicant: Eric A. Krussman, Pocatella” * * *

APPLICATION FOR MEMBERSHIP IN
PACIFIC WOODMEN LIFE ASSOCIATION

* * * * * * *

I hereby certify, agree and warrant that I am of sound bodily health and mind; that I am temperate in habits and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the As-

(Deposition of V. J. Pakes.)

sociation now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any Beneficiary Certificate that may be issued to me by the Sovereign Camp of the Pacific Woodmen Life Association, whether printed or referred to therein or not.

I hereby waive the attaching of copies thereof to said Certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto; and I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure. * * *

(Signed) ERIC A. KRUSSMAN,

Applicant

Postoffice Address

Pocatello, Idaho." [213]

A. Yes, it is his application for membership.

Mr. Jones: At this point defendant's exhibit marked number 1 was offered. We offer it at this time.

(Deposition of V. J. Pakes.)

Mr. Merrill: If Mr. Jones is using the deposition, and the exhibits they go in as exhibits for the plaintiff and not as defendant's exhibits.

Mr. Jones: Very well, we will offer the exhibit.

The Court: Yes, the defendant is not putting on their case at this time.

Mr. Merrill: Then it is understood that they are the plaintiff's exhibits.

The Court: He offers them as his exhibit.

Mr. Merrill: Well, let's not have any misunderstanding as to the exhibits.

The Court: It is a part of their case. They may be admitted as their exhibit. Plaintiff's exhibit.

Q. Was there a benefit certificate issued to Mr. Krussman?

A. There was a benefit certificate issued to Mr. Krussman.

Q. Mr. Pakes, I hand you a benefit certificate marked exhibit "2" and ask if it is the certificate issued to Mr. Krussman?

A. Yes, it is the certificate issued to Eric A. Krussman [82] No. T E 1321001, for \$5,000.00 under date of September 30, 1935.

Q. You are familiar with the signature of D. E. Bradshaw and John T. Yates, former Secretary of the Pacific Woodmen Life Association?

A. I am.

(Deposition of V. J. Pakes.)

Q. Are the signatures appearing on this certificate the true signatures of Mr. D. W. Bradshaw and Mr. John T. Yates?

A. They are the true signatures of Mr. Bradshaw and Mr. Yates.

Mr. Jones: We offer that certificate. It says in the deposition "Defendant offers in evidence exhibit "2" being the benefit certificate No. T E 1321001 issued to Eric A. Krussman on September 30, 1935.

Mr. Merrill: I move that be stricken, the statement that the defendant offers the exhibit.

The Court: It doesn't make any difference how it is designated in the deposition, the plaintiff is offering its proof at this time, this is the plaintiff's exhibit.

Mr. Jones: Yes, we offer it as our exhibit.

The Court: It will be treated as your proof, and it doesn't make any difference what the procedure was at the taking of the deposition. You are putting your proof in now. [83]

Mr. Merrill: Just so we understand it.

The Court: Plaintiff's exhibit "2" is admitted.

[Printer's Note]: Plaintiff's Exhibit 2 is here omitted as it is set forth at pages 3 to 9 of this printed transcript of record.

Q. Mr. Pakes, I observe from this certificate that the name of the Society is designated Pacific

(Deposition of V. J. Pakes.)

Woodmen Life Association. Has the name of the society been changed since that certificate was issued?

A. Yes, the name has been changed. I believe the date of change of name was September 1, 1937, and the new name is Omaha Woodmen Life Insurance Society.

Q. Has there been any change in the character of the Society along with the change of name?

A. There was no change in the character of the society.

Q. Will you please state what is the character of the society, what type of society is the defendant?

A. The Omaha Woodmen Life Insurance Society is a fraternal benefit society organized under the laws of Nebraska having a lodge system, ritualistic form of work, representative form of government, and conducted solely for the mutual benefit of its members, and not for profit.

Q. Does the Society have a constitution, laws and by-laws, and did it have such constitution, laws and by-laws at the time the certificate was issued to Mr. Krussman?

A. It has now, and did at the time of issuance of the certificate to Mr. Krussman.

Q. I hand you what purports to be a true printed copy of [84] the constitution, laws and by-laws of 1935, which became effective September 1,

(Deposition of V. J. Pakes.)

1935, marked Exhibit 3. Will you please state if that is such copy, and if it was in force at the time the certificate referred to was issued?

Mr. Jones: We ask that this be marked as exhibit "3".

Portions of Plaintiff's Exhibit No. 3, Being Constitution, Laws and By-Laws of The Pacific Woodmen Life Association, July 1935.

Sec. 63 (a) In order to accumulate and maintain funds for the payment of the benefits stipulated in beneficiary certificates held by the members of this Association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Association, every member of this Association shall pay to the Financial Secretary of his Camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the by-laws of his Camp.

(b) If he fails to make any such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such

(Deposition of V. J. Pakes.)

person and the Association shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Association as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said member from the delivery of his certificate to the date of his suspension; except as otherwise provided in his certificate or in Sections 77 and 79.

Sec. 65. Any person who has become suspended because of the non-payment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant [215] that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained

(Deposition of V. J. Pakes.)

without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments of assessments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever.

Sec. 66. (a) The retention by the Association of any installment of assessment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or an estoppel upon the Association.

(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment of assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void.

Sec. 82. (a) No officer, employee or agent

(Deposition of V. J. Pakes.)

of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor shall any custom on the part of any Camp or any number of Camps—with or without the knowledge of any officer of the Association——have the effect of so changing, modifying, waiving or foregoing such laws or requirements. [216] Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these laws by the Association or an estoppel of this Association.

(b) The Constitution and Laws of the Association now in force, or which may hereafter be enacted, the application and beneficiary certificate of membership shall constitute the contract between this Association and the member.

Sec. 105. (a) The President and Secretary of the Association shall appoint and may remove at will a Financial Secretary for each Camp, who shall be paid at least the same compensation per member per month by the Camp as has heretofore been paid to the Clerk by the local Camp.

(Deposition of V. J. Pakes.)

(b) The Financial Secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the Camp dues and the Sovereign Camp fund assessments and monthly installments thereof, and shall monthly pay the Camp dues so collected to the Banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the Sovereign Camp to the Secretary of the Association at the headquarters of the Association as provided for in Section 111, and shall give a good and sufficient bond in an indemnity association or company for the faithful performance of his duties in such sum as the President shall direct, the premium for such bond to be paid by the Sovereign Camp.

Sec. 109. (g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and [217] By-Laws of this Association nor to bind the Sovereign Camp by any such acts.

Sec. 111. On or before the fifth day of every month the Financial Secretary of each Camp shall remit all the Sovereign Camp funds in his hands and all other funds due the Sovereign

(Deposition of V. J. Pakes.)

Camp to the Secretary of the Association. Such amounts shall be remitted in money order, certified check, bank cashier's check, or bank draft with exchange, payable to the order of the Treasurer. Accompanying such remittances, the Financial Secretary shall also forward such detailed statement of the standing of the members in the Camp as shall be required for the information of the Secretary of the Association, upon blanks furnished for that purpose.

A. Yes, this is a copy of the constitution, laws and by-laws as amended and adopted at the session held in New York, July 1935, in effect September 1, 1935.

Q. Mr. Pakes, I hand you exhibit "4" and ask you if that is a true copy of the Constitution, laws and by-laws of the society which became effective September 1, 1937?

Mr. Jones: I ask that it be marked as exhibit 4.

(Deposition of V. J. Pakes.)

Portions of PLAINTIFF'S EXHIBIT No. 4,
Being Constitution, Laws and By-Laws of
the Omaha Woodmen Life Insurance So-
ciety, June, 1937.

Sec. 63. (a) In order to accumulate and maintain funds for the payment of the benefits stipulated in beneficiary certificates held by the members of this Society, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Society, every member of this Society shall make to the Financial Secretary of his Camp one annual payment in advance each year, or one monthly installment thereof, on or before the first day of each calendar month, as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the by-laws of his Camp.

(b) If he fails to make any such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Society as his liquidated proportionate part of the cost of doing business and the cost of the pro-

(Deposition of V. J. Pakes.)

tection furnished on the life of said member from the delivery of his certificate to the date of his suspension; except as otherwise provided in his certificate or in Sections 77 and 79.

Sec. 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making [219] him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making payments shall be received and retained without waiving any of the provisions of this Section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Pro-

(Deposition of V. J. Pakes.)

vided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever.

Sec. 66. (a) The retention by the Society of any installment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws or an estoppel upon the Society.

(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void.

Sec. 82. (a) No officer, employee or agent of the Society or the Sovereign Camp, Head Camp or of any Camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor shall any custom on the part of any Camp or any number of [220] Camps—with or without the

(Deposition of V. J. Pakes.)

knowledge of any officer of the Society—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Society constitute a waiver of the provisions of these laws by the Society or an estoppel of this Society.

(b) The Constitution and Laws of the Society now in force, or which may hereafter be enacted, the application and beneficiary certificate of membership shall constitute the contract between this Society and the member.

Sec. 109. (g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such act. [221]

A. Exhibit 4 is the constitution, laws and by-laws of the Omaha Woodmen Life Insurance Society as amended at the session at Los Angeles, California, June, 1937, and in effect September 1, 1937.

(Deposition of V. J. Pakes.)

Q. To what date did those by-laws remain in force without amendment?

A. Exhibit 4 remained in effect until September 1, 1939.

Q. Were the Constitution, laws and by-laws again amended in 1939?

A. Yes, they were amended in 1939.

Q. I hand you a pamphlet marked Exhibit 5, and ask you if that was the constitution, laws and by-laws as amended in 1939 [85] and also how long it remained in effect?

Mr. Jones: I ask that be marked as exhibit 5.

Portions of Plaintiff's Exhibit No. 5, Being
Constitution, Laws and By-Laws of the
Omaha Woodmen Life Insurance Society,
June, 1939.

Sec. 63. (a) In order to accumulate and maintain funds for the payment of the benefits stipulated in beneficiary certificates held by the members of this Society, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Society, every member of this Society shall make to the Financial Secretary of his Camp one annual payment in advance each year, or one monthly installment thereof, on or before the first day of each calendar month,

(Deposition of V. J. Pakes.)

as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the by-laws of his Camp.

(b) If he fails to make any such payment on or before the last day of the month it shall thereby become delinquent, he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Society as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said member from the delivery of his certificate to the date of his suspension; except as otherwise provided in his certificate or in Sections 77 and 79.

Sec. 65. Any person who has become suspended by his failure to pay any monthly installment may, if living, within fifteen days from the date of his suspension again become a member of the Society by the payment of the delinquent installment to the Financial Secretary of the Camp. After fifteen days and within three months from the date of his suspension he may again become a member of the Society by the payment of the delinquent installments,

(Deposition of V. J. Pakes.)

provided he is in good health at the time of such payment [222] and remains in good health for thirty days thereafter.

Whenever payments are made by a person who has been suspended for more than fifteen days, for the purpose of again becoming a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended by not making payments, as well as all subsequent payments by him made, shall be received and retained by the Society without waiving any of the provisions of this section, or of these laws, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. Provided, that the receipt and retention of such payments, in case such person is not in good health, or does not remain in good health for thirty days thereafter, shall not make such person again a member of the Society, nor entitle him or his beneficiary or beneficiaries to any rights watever.

(Deposition of V. J. Pakes.)

Sec. 66. (a) The acceptance and retention by the Society of any payments made after such attempt to again become a member shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, nor operate as an estoppel against the Society, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or that he did not remain in good health for thirty days after the payment of the delinquent installments in an attempt to again become a member.

(b) Any attempt by a person suspended for more than fifteen days to again become a member shall not be effective for [223] that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any such unpaid installment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void.

Sec. 72. (a) Should a member desire to change the beneficiary or beneficiaries named in his certificate, he may do so by filing with the Secretary of the Society his written request, properly witnessed, giving the name or names

(Deposition of V. J. Pakes.)

of such new beneficiary or beneficiaries; or by delivering the same to the Financial Secretary of a Camp for transmission to the Secretary of the Society. The Secretary of the Society shall endorse the name or names of the new beneficiary or beneficiaries upon the certificate of the member; or he may issue a new certificate to him, subject to the same conditions as the one surrendered, containing the name or names of the newly designated beneficiary or beneficiaries. He shall keep a record of such change in his office. In case of the death of such member after the execution and delivery of the request for change to the Secretary of the Society or to the Financial Secretary of a Camp and before the change is executed by the Secretary of the Society, then and in that event the amount payable upon such certificate shall be paid to such newly designated beneficiary or beneficiaries according to the terms of such member's request.

(b) No change of beneficiary shall be allowed or be binding on this Society or any beneficiary which is not requested in writing as herein provided more than twenty-four hours before the death of said member.

Sec. 82. (a) No officer, employee or agent of the Society or the Sovereign Camp, Head Camp or of any Camp, has the power, right

(Deposition of V. J. Pakes.)

or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor [224] shall any custom or course of dealing on the part of any Financial Secretary or of any Camp or any number of Camps—with or without the knowledge of any officer of the Society—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Society constitute a waiver of the provisions of these laws by the Society or an estoppel of this Society.

(b) The Articles of Incorporation, the Constitution, Laws and By-Laws of the Society, the application and medical examination, or declaration of insurability, if accepted in lieu of medical examination, signed by the applicant, and all amendments to each thereof, the benefit certificate, and any riders attached thereto or endorsements made thereon by the President or Secretary of the Society shall constitute the contract between the Society and the member.

(Deposition of V. J. Pakes.)

Sec. 107. (a) It shall be the duty of the Financial Secretary to have charge of the records of the Camp, attend to the correspondence, issue all warrants paying out Camp funds, and all miscellaneous matters pertaining to its welfare and perform such duties as may be required by the Camp. He shall deliver all Camp books and records to the Society's officers or to any representative of the Camp when requested so to do by any such officer or representative thereof. He shall also keep the minutes of the proceedings of every meeting of the Camp.

(g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such acts.

(h) No Financial Secretary shall have any power or authority to make any agreement to call upon and collect from a member, or any other person, any monthly installment or installments, [225] or for any other time or manner of payment than that prescribed in Section 63(a) of this Constitution, Laws and By-Laws; and any such attempted or purported agreement on his part shall not be binding upon the Society: [226]

(Deposition of V. J. Pakes.)

A. Exhibit 5 is a copy of the constitution, laws and by-laws of the Omaha Woodmen Life Insurance Society as amended at the session in New York, New York, June, 1939, in effect September 1, 1939, which remains in effect until September 1, 1941.

Q. They are still in effect, are they not?

A. Yes.

Mr. Jones: At this point defendant offered in evidence exhibits 3, 4 and 5, and we now offer them in evidence.

The Court: They may be admitted.

Q. Mr. Pakes, what rate of assessment was Mr. Krussman required to pay on this certificate?

A. He was required to pay \$11.70, per month.

Mr. Jones: We will skip the next two questions.

Q. Did the society receive proofs of death of Mr. Krussman? A. It did.

Q. Do you recall about what date those proofs of death were received?

A. They were received on August 8, 1940.

Q. Mr. Pakes, I hand you statement of Camp officers, certificate of attending physician, statement of beneficiary, and death certificate which have been marked as exhibits 6, 7, 8 and 9, respectively, and ask you if those exhibits are [86] the proofs of death which were received by the defendant on August 8, 1940?

(Deposition of V. J. Pakes.)

Mr. Jones: We ask that these certificates be marked exhibits 6, 7, 8, and 9, just as they were marked at the time of the taking of the deposition.

A. Yes, they are the proofs of death received by the home office on August 8, 1940.

Q. Mr. Pakes, calling your attention to the lead pencil notation on the Statement of camp officers, exhibit 6, may I ask if that lead pencil notation was on the statement when it was received, or if that is an office notation made afterwards?

A. This notation was made by the office after the proofs had been received here, and indicates the amount of remittance received with the proofs.

Q. What action was taken on these proofs of death upon receipt of them?

A. They were referred to the Claim Department.

Q. If you know, was the claim for death benefit approved or rejected?

A. Claim was rejected.

Mr. Jones: Now, we omit the deposition down to the middle of page five where Mr. Yeager offered exhibits 6, 7, 8 and 9, and we offer them in evidence at this time. That is at the middle of page five of [87] the depositions.

The Court: Admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. 6.

PROOFS OF DEATH

Statement of Camp Officers

This blank is distributed to Camps in advance to expedite the making of proof of claim. The furnishing of same by a Camp or any officer thereof shall not be an acknowledgment of liability of the Society, nor shall such act constitute a waiver of any rights of the Society, nor create an estoppel of the Society.

We, the undersigned Consul Commander, Banker and Financial Secretary of Camp No. 7, located at Pocatello, County of Bannock, State of Idaho, hereby certify that Eric A. Krussman, a member of this Camp, who held certificate No. TE 1321001, died at Pocatello, Idaho, County of Bannock, State of Idaho, on the 2 day of August, 1940, and that the cause of his death is reported to us as cerebral hemorrhage.

The deceased held the office of none in this Camp.

The last two Monthly Installments paid to the Financial Secretary for the deceased were Installment No. 7-8, of the year 1940, amount \$23.70, paid on the 1st day of Aug. 1940, by, and Installment No....., of the year....., amount \$....., paid on the..... day of, 19....., by Bazil Fleming, Secty.

(Deposition of V. J. Pakes.)

Recd chk #871 [illegible] #7 & 8—Amt \$23.70 Cr. 30c to Camp (8/8/40)

Have above installments been forwarded to the Home Office?.....If not, remittance should accompany this statement.

The Camp records show that the deceased last became suspended on the first day of..... 19....., by the non-payment of Installment No., for the month of....., 19....., and that his delinquent installments were paid on the.....day of....., 19....., by....., and that he last previously became suspended on the first day of, 19....., by the non-payment of Installment No....., for the month of....., 19....., and that his delinquent installments were paid on the..... day of....., 19....., by.....

We certify that the last occupation of the deceased, immediately prior to his death, was that of Hotel Manager, and that he had been engaged in such occupation for.....years. His previous occupation was.....for.....years.

The Benefit Certificate is payable to Harry E. Krussman and if this claim is allowed we believe the following named persons legally entitled to the benefits in the following amounts respectively:

Amount	Name	Relationship	Age	Postoffice Address
.....	Harry E. Krussman	Son	33	Twin Falls, Idaho
.....	Marian Krussman	Daughter	15	Pocatello, Idaho

(Deposition of V. J. Pakes.)

Signed at Pocatello, State of Idaho, this 6th
day of August, 1940.

(Camp Seal)

.....
Consul Commander.
.....

Banker.

(Camp Seal) BAZIL FLEMING,
Financial Secretary
Cashier Dept. M. Aug. 8, 1940 [227]

—————
PLAINTIFF'S EXHIBIT 7.

“Proofs of Death

Certificate of Attending Physician

* * * * *

I, Fred M. Ray, M.D. hereby certify that I
am a legal practitioner of medicine, that I
graduated from Northwestern Medical College
in the year 1909, and that I attended as a
physician in the last illness of Eric Alfred
Krussman of Pocatello, State of Idaho, that
he died at Pocatello, State of Idaho, on the 2
day of August, 1940 and that the statements
and answers herein made by me are true to the
best of my knowledge and are in my own hand-
writing:

* * * * *

(Deposition of V. J. Pakes.)

3. At last illness, how long was deceased sick? Two years.

4. When did deceased show first symptom of his final illness? August, 1938.

5. For how long a time was deceased confined to his house or prevented from attending to his business? Totally disabled (most of time) since August, 1938.

6. When, how long and for what did you treat deceased during his last illness? Cerebral hemorrhage (right side paralysis)

7. Date of your first visit or prescription. August, 1938.

8. Date of your last visit. August 2d, 1940.
(Signed) FRED M. RAY, M.D." [228]

PLAINTIFF'S EXHIBIT 8.

"Proof of Death

Statement of Beneficiary

* * * * *

The undersigned states that Eric A. Krussman, who held Benefit Certificate No. P.E. 1321001 dated....., 1....., died at Pocatello, County of Bannock, State of Idaho, on the 2 day of August, 1940, the cause of his death being cerebral hemorrhage * * * The deceased was taken sick with the trouble which caused his death on the.....day of August,

(Deposition of V. J. Pakes.)

1938, and the duration of his last illness was two years * * * *

(Signed) HARRY E. KRUSSMAN.

Witness: Basil Flemming." [229]

PLAINTIFF'S EXHIBIT 9.

"Certificate of Death

State of Idaho

* * * * *

3 (a) Full name—Eric Alfred Krussman.

* * * * *

MEDICAL CERTIFICATE OF DEATH

I hereby certify, that I attended deceased from August, 1938 to August 2, 1940 * * * Immediate Cause of death: Due to H.B.P. and cerebral hemorrhage—two years ago. * * * *

(Signature) F. M. RAY, M.D.

8/3/1940" [230]

Mr. Jones: Then commencing on the next page, that would be page 6 of the deposition, the first question.

Q. Mr. Pakes, did Mr. Krussman pay his installment for the month of July 1939 during that month.

A. Mr. Krussman paid the July installment on August 29, 1939.

(Deposition of V. J. Pakes.)

Q. To whom was payment made?

A. Payment was made to Morris Sheppard, Treasurer of the society.

Q. To whom did Mr. Krussman make payment?

A. Mr. Krussman made payment to the financial secretary.

Mr. Jones: I asked the question at that point. "You mean delivered the check?"

A. Yes, delivered the check.

Mr. Jones: I will omit the next questions and answers down to the stipulation at the bottom of page 6,

It is understood and agreed between plaintiff, by his attorney T. D. Jones, and by defendant by George Yeager of counsel for defendant, that the deposition now being taken of Mr. Pakes may be read in evidence, or any part thereof by the plaintiff in the presentation of its case.

Mr. Yeager, said that was so understood.

Q. Mr. Pakes, I have in my hand a check dated August 24, 1939 [88] which was handed to me by Mr. Jones, and ask you if the payment of the July 1939, installment was made by means of that check marked Exhibit 12?

Mr. Jones: We ask that be marked exhibit 12.

A. Exhibit 12 is the check dated August 24,

(Deposition of V. J. Pakes.)

1939 payable to Morris Sheppard for \$11.85, and received at this office on August 28, 1939, and deposited at the Omaha National Bank on August 31, 1939.

Mr. Jones: Defendant offered in evidence exhibit 12, and we offer the exhibit now as exhibit 12.

The Court: Admitted.

Q. Mr. Pakes, I hand you a check marked exhibit 13 made payable to Harry E. Krussman, and ask you if it is the refund check which was tendered to Harry E. Krussman as refund of assessments on November 14, 1940?

Mr. Jones: We ask that this be marked exhibit 13, now.

A. Exhibit 13 is the original check payable to Harry E. Krussman covering the refund of installments from July 1939 to August 1940, inclusive.

Mr. Jones: I will skip the next question. At that point defendant offered exhibit 13, and we now offer exhibit 13 in evidence.

The Court: Admitted.

Q. Mr. Pakes will you explain how this check now comes to be in your possession? Was it returned by Mr. Krussman or someone in his behalf?

[89]

A. Yes, the check has been returned to this office without being cashed. It was received on December 2, 1940.

(Deposition of V. J. Pakes.)

The Court: This last exhibit, you understand that it was admitted.

Q. Did Mr. Krussman refuse to accept tender of refund? A. He did.

Mr. Jones: Now I will skip the questions and answers to the bottom of page ten.

Q. Will you explain the duties of the financial Secretary in connection with receipt and transmission of assessments paid by members to the Secretary of the Society?

A. The financial Secretary, one of his duties is to remit all moneys to the home office paid to him by the members.

Mr. Jones: I will omit the questions and answers down to the bottom of page 11, third question from the bottom of page 11.

Q. As I understand it, Mr. Pakes, from your testimony, the society's defense to this action is that Mr. Krussman failed to pay the July 1939, installment of assessment and became suspended August 1, 1939, is that correct?

A. That is my understanding.

Q. Mr. Pakes, I hand you exhibit number 2, the benefit certificate involved in this action, and ask you who was the designated beneficiary at the time the certificate was issued?

A. At the time the certificate was issued, the designated [90] beneficiary was Sagred Marie Krussman, wife.

(Deposition of V. J. Pakes.)

Q. Was the beneficiary subsequently changed? If so, to whom?

A. The beneficiary was changed on the 29th day of May 1940 making the beneficiary Marian Alice Krussman, daughter.

Q. Calling your attention to the back of the certificate, may I ask whose signature appears under the words "endorsed by"?

A. It is the signature of Farrar Newberry, Secretary of the society.

Q. Mr. Pakes, I hand you exhibit 14 which appears to be a request for change of beneficiary, and ask you if that request was received by the Secretary of the society?

A. Exhibit 14 is the request for change of beneficiary and was received by the Secretary of the Society on the 27th day of May 1940.

Mr. Jones: I ask to have exhibit 14 marked by the Clerk as exhibit 14.

Q. Was the endorsement of change of beneficiary on the back of the certificate under date of May 29, 1940 made pursuant to the request contained in Exhibit 14? A. It was.

Q. Mr. Pakes, referring again to exhibit 14, will you state whether the pencil notations and stamps appearing thereon were there when it was received, or were they placed there in your office?

(Deposition of V. J. Pakes.)

A. The marginal pencil notations and also the stamp notations were made at this office.

Mr. Jones: Mr. Yager offered the defendants exhibit 14 and we offer it at this time.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. 14.

Pocatello, Idaho

May 24, 1940.

Cashier Dept A

May 27 1940

Mr. Bazil Flemming

Financial Secretary

Bannock Camp #7

Pacific Woodman Life Association

Omaha, Nebraska

OK

528-40 Change Endorsed May 29 1940

App. Record

Referring to certificate #T E 1321001, policy in the name of Eric A. Krussman, I wish to at this time change the beneficiary from Sacred Marie Krussman to my daughter Marian Alice Krussman.

I will appreciate you attending to this matter immediately.

I herewith turn over to you my certificate #T E 1321001 for which I'd appreciate your attending to the same.

Sincerely

E. A. KRUSSMAN.

(Deposition of V. J. Pakes.)

Acknowledging certificate #T E 1321001 for which I hereby receipt for receiving same.

Witness Sign BASIL FLEMMING
 Bannock Camp-7
 Idaho

It is understood that this change of beneficiary is now in effect.

Sign. [231]

Q. Mr. Pakes, I hand you a letter marked exhibit 15, dated June 17, 1940, addressed to Bazel Flemming, Financial Secretary of Camp 7, purporting to request change of beneficiary, and ask if that was received by the Society?

A. We received such a letter on August 8, 1940.

Q. I also hand you exhibit 16 which appears to be a letter from Eric A. Krussman, to H. E. Krussman and H. E. Krussman's reply thereto, and as if it was received by the defendant, and if so, when?

A. Said letter was received by the defendant society on August 8, 1940.

Q. Was exhibit 15 and exhibit 16 received at the same time?

A. They were received at the same time.

Q. At the same time the proofs of death were received? A. On the same date.

Mr. Jones: We ask to have the two exhibits

(Deposition of V. J. Pakes.)

marked as exhibits 15 and 16 corresponding to the marking given before the Notary Public. Mr. Yager offered them in evidence and we offer them at this time as exhibits 15 and 16.

Mr. Merrill: I want it clear that we are not [92] offering any of these exhibits.

The Court: I am not interpreting it that way. The Plaintiff is now offering his case and these go in as the plaintiff's exhibits. That is the way I interpret this. It will be so understood and the exhibits are admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. 15.

Pocatello, Idaho

June 17, 1940

Cashier Dept. M.

Aug 8 1940

Rec'd Aug 8 1940

Claim Dept.

Mr. Bazil Flemming

Financial Secretary

Bannock Camp #7

Pacific Woodman Life Association

Omaha, Nebraska

Dear Sir:

Referring to Certificate #TE-1321001, policy in the name of Eric A. Krussman, I wish at this time to change the beneficiary from Marian Alice Krussman to my son, Harry E. Krussman.

I will appreciate your attention to this immediately. I am herewith turning over to you my Certificate #T E 1321001, and would appreciate your attending to the matter at your earliest possible convenience.

Yours sincerely,

E. A. KRUSSMAN.

Acknowledging Certificate #T E 1321001, for which I hereby receipt for receiving same.

BAZIL FLEMING.

(Deposition of V. J. Pakes.)

It is understood that this change of beneficiary is now in effect.

BAZIL FLEMING. [232]

PLAINTIFF'S EXHIBIT No. 16

Pocatello, Idaho

June 20, 1940

Cashier Dept. M

Aug 8 1940

Mr. Harry E. Krussman,
Twin Falls, Idaho.

My dear Harry:

As you know, from our discussion here last Sunday, I hold Certificate No. TE 1321001, policy in Pacific Woodman Life Association, for the sum of \$5,000 payable to Marian Alice Krussman as beneficiary. I explained to you there were spiritual reasons that I did not want to have a guardian appointed over Marian for the collection and disposition of the proceeds of said policy; and in order to obviate the necessity of appointing a guardian, that I was going to change the beneficiary in the policy and make it payable to you, with the understanding of course that you would receive the proceeds in trust for the following purposes: that is to say, that you would use \$300 of the

(Deposition of V. J. Pakes.)

same for my burial expenses, pay to Beatrice Krussman Ginzal, my daughter, \$700; and the remaining \$4,000 to be held in trust and paid by you to Marian Alice Krussman for her enjoyment, support and education. That the payments to be made to her shall be at your discretion, as I know you will handle the matter for her best interests, the trust to last until she shall arrive at the age of majority, when the balance shall be paid to her by you.

At the time I had the discussion with you, you stated that you would be willing to accept the trusteeship, and handle the matter as I desire. As you know I have always been grateful to you for what you have done, and for what you will do in taking care of this matter, which is the most important thing to me which I can conceive of.

With love from your father,

ERIC A. KRUSSMAN.

Received Aug 8 1940. Claim Dept.

Twin Falls, Idaho

June 25, 1940

Mr. Eric Krussman,
Pocatello, Idaho

Dear Father:

I have just received the foregoing letter from you in which you refer to the conversation we

(Deposition of V. J. Pakes.)

had, and in which you state you are going to change the beneficiary under the certificate above described, from Marian Alice Krussman, to myself, in order that I may receive the proceeds direct and handle the same as directed in the above letter.

In the event that I am made beneficiary under such certificate, I hereby agree to accept the terms of the trust above set out and agree that if, as and when any moneys shall come into my hands as the proceeds of Certificate No. TE 1321001, policy in Pacific Woodman Life Association, I will use the sum of \$300 thereof for the payment of your burial expenses, immediately pay to your daughter Beatrice Krussman Ginzle the sum of \$700 and hold in trust the sum of \$4,000, being the remaining proceeds of said policy, for the use, enjoyment, benefit, education and support of your daughter Marian Alice Krussman, part or all of said \$4,000 to be paid to her during the time she is under the age of majority as in my discretion shall appear to be most beneficial to her; and I further agree that any of the said trust fund belonging to said Marian Alice Krussman, remaining in my hands after she shall have reached the age of majority, will be by me paid to her.

Your son,

H. E. KRUSSMAN. [233]

(Deposition of V. J. Pakes.)

Q. Mr. Pakes, was there a provision in the constitution, laws and by-laws in effect on the date the instruments designated as exhibits 15 and 16 providing for a change of beneficiary were received, and if so, please refer to the same?

A. Section 72, subsections (a) and (b) of the Constitution laws and by-laws adopted and amended in June, 1939, and in effect September 1, 1939, contains a clause for change of beneficiary which reads as follows: "Section 72 (a) Should a member desire to change the beneficiary or beneficiaries named in his certificate he may do so by filing with the secretary of the society his written request, properly witnessed, giving the name or names of such new beneficiary or beneficiaries; or by delivering the same to the financial secretary of a camp for transmission to the secretary of the society. The secretary of the society shall endorse the name or names of the new beneficiary or beneficiaries upon the certificate of the member, or he may issue a new certificate to him, subject to the same conditions as the one surrendered, [93] containing the name or names of the newly designated beneficiary or beneficiaries. He shall keep a record of such change in his office. In case of the death of such member after the execution and delivery of the request for change to the Secretary of the Society or to the financial secretary of a camp and before the change is executed by the secretary of the society, then and in that event the amount payable upon such certificate shall be paid to such newly

(Deposition of V. J. Pakes.)

designated beneficiary or beneficiaries according to the terms of such member's request.

(b) No change of beneficiary shall be allowed or be binding on this society or any beneficiary which is not requested in writing as herein provided more than twenty-four hours before the death of said member."

Q. Mr. Pakes, do you have records or knowledge as to the date upon which exhibits 15 and 16 were delivered to Basil Flemming, financial secretary of camp number 7? A. No.

Q. Mr. Pakes, I hand you a letter dated August 6, 1940, marked exhibit 17, written by Mr. Basil Flemming, addressed to Mr. D. E. Bradshaw, and ask if that letter was received along with exhibit 15 and 16? A. It was.

Mr. Jones: Defendant offered exhibit 17 and we wish to have it marked now and offer it in evidence. [94]

The Court: It may be admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. 17

August 6, 1940

Cashier Dept. M.

Aug 8 1940

Mr. De E. Bradshaw
Pacific Woodman Life Assn.
Omaha Neb.

Esteemed Sovereign:

On June the 17, 1940, Mr. E. A. Krussman of Pocatello Idaho, signed in my presence a request for a change of beneficiary on his policy #1321001, And was to deliver to me the request after he had his attorney Mr. T. D. Jones write his son Harry the manner in which he wished him to dispose of the monies from the policy.

I left town on my vacation and did not return till Aug. 1, 1940. I have known Mr. Krussman for 35 yrs. and I also know this was his wish at the time of his death.

I feel that I am to blame in this matter, and I hope that you can handle as Mr. Krussman desired.

This arrangement also has the approval of all of his children as their signatures below shows.

Yours Truly,

BAZIL FLEMMING

MARIAN KRUSSMAN

MRS. BEATRICE GINZEL

H. E. KRUSSMAN

Received Aug. 8, 1940. Claim Dept. [234]

(Deposition of V. J. Pakes.)

Q. Mr. Pakes, was there at any time endorsed on the back of certificate Number T. E. 1321001 a change of beneficiary in accordance with the request contained in exhibit 15?

A. There was not.

Q. Referring again to the certificate, exhibit 2, will you please explain the stamp appearing on the face thereof concerning the change of beneficiary?

A. That was a customary procedure in the office referring to change of beneficiary with reference to the reverse side of the beneficiary certificate where the change of beneficiary was made.

Q. Was that placed there for the convenience of the home office when it came in?

A. It was put in there as a special warning, warning to the office help, or anyone outside.

Q. When was that placed there, Mr. Pakes?

A. It was put on at the same time the endorsement of change of beneficiary was made on May 29, 1940.

Q. Mr. Pakes, there also appears on the back of the certificate beneath the name of Marian Alice Krussman, daughter a notation in red pencil, "see request for change." Will you please explain to what that notation refers?

A. This is an office notation, and refers to a letter or some form of request that was filed here in the office for change of beneficiary. [95]

Q. Did that refer to a request for change of

(Deposition of V. J. Pakes.)

beneficiary which has been introduced in evidence as exhibit 15, and also exhibit 16?

A. It refers to those exhibits.

Q. Was that notation also put there for a warning and in the handling of the claim? A. Yes.

Mr. Jones: It is agreed by George Yeager counsel on behalf of the defendant, and T. D. Jones attorney for plaintiff, on behalf of the plaintiff, that V. J. Pakes, is the Assistant Secretary of the defendant Society, and as such has custody and control of all of its records, papers and correspondence with reference to members of the society, and the payment of assessments and especially the correspondence in connection therewith; and that he has full authority to bind the defendant upon all statements that he makes.

That is all the direct examination and I will go on with the Cross.

Cross Examination

By Mr. Jones:

Q. I show you what has been marked plaintiff's exhibit A, and ask if you recognize the signature on that letter? A. I do.

Mr. Merrill: We object to counsel cross-examining his own witness. [96]

Mr. Jones: We have a stipulation that we may read any part of the deposition.

(Deposition of V. J. Pakes.)

The Court: Yes, if you read it, then it is a part of your case. That is the interpretation I made earlier.

Mr. Merrill: Is that a ruling on my objection.

The Court: He is introducing this as his evidence. Either side may read any part of the deposition.

Mr. Jones: I will make him my witness, I don't care about that.

The Court: I understood that the side who examined a witness made him their witness, that is what happened here on this direct examination and now he goes on to the cross examination.

Mr. Jones: At the time of the taking of the deposition I started with this witness and then the attorney for the defendant said "let me take him" and that is the way it came that he examined him at the time of the taking of the deposition.

The Court: If this case should go to the upper Court it should be clear as to whose witness this is.

Mr. Jones: I will make the witness my witness.

The Court: Very well, now you may proceed [97]

Q. Whose is it?

A. H. W. McArthy's.

(Deposition of V. J. Pakes.)

Q. Mr. McArthy is a claim man?

A. Head of the claim Department.

Q. Of the defendant?

A. Of the defendant.

Mr. Jones: Will you admit that he had authority to write that?

Mr. Yeager: Yes, it is admitted on behalf of counsel for the defendant that Mr. McArthy had authority to write the letter which is identified as exhibit A.

Mr. Jones: We ask at this time to have that marked as exhibit A to correspond with the marking at the time of the taking of the deposition. We offer it in evidence at this time.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. A

Omaha Woodmen Life Insurance Society
Omaha, Nebraska

January 7, 1941.

Jones, Pomeroy & Jones

Attorneys at Law

Central Building

Pocatello, Idaho

Attention: Mr. T. D. Jones

Gentlemen: Re Eric A. Krussman, deceased

Certificate No. TE-1321001

Responsive to your request of January 3 we are enclosing the request for change of benefi-

(Deposition of V. J. Pakes.)

ciary executed by the late Eric A. Krussman in connection with the above numbered benefit certificate issued on his life by this Society.

This constituted a valid request for change of beneficiary in accordance with the provisions of the Constitution, Laws and By-laws of this Society.

Very truly yours

CLAIM DEPARTMENT

By H. W. McARTHY

hwm/mlf

encl [235]

Q. Mr. Pakes, I show you exhibit B and ask you to state if you recognize the signature appearing on that letter?

A. I do. It is a letter from the Claim Department of the society, signed by H. W. McArthy to Jones, Pomeroy & Jones.

Mr. Jones: We can read this later if we desire.

The Court: Yes.

Mr. Jones: Will you admit Mr. Yeager that Mr. McArthy had authority to write exhibit B.

Mr. Yeager: Yes.

Mr. Jones: We ask that this letter be [98] marked as exhibit B and we offer it as plaintiff's exhibit B.

The Court: Admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. B

Omaha Woodmen Life Insurance Society
Omaha, Nebraska

January 14, 1941

Jones, Pomeroy & Jones

Attorneys at law

Central Bldg.

Pocatello, Idaho.

Attention: Mr. T. D. Jones

Gentlemen: Re: Eric A. Krussman, deceased
Certificate No. TE-1321001

Replying to your letter of January 10, the Pacific Woodmen Life Association was changed by an amendment to the Articles of Incorporation to Omaha Woodmen Life Insurance Society, effective as of August 3, 1937.

Proof of death of the late Eric A. Krussman was submitted to this office by the late Basil Fleming.

Very truly yours

CLAIM DEPARTMENT

By H. W. McARTHY

hwm/mlf [236]

Mr. Jones: At the time of the taking of the deposition Mr. Yeager representing the defendant made the statement that the defendant ad-

(Deposition of V. J. Pakes.)

mits that proof of death was made by plaintiff Harry E. Krussman.

Mr. Merrill: Yes.

Q. I will ask you if Mr. Newberry Secretary, uses a stamp signature or does he sign his letters?

A. They are stamp signatures.

Q. I will ask you if the name on the back of the certificate, which is marked as defendant's exhibit 2, is the stamp signature, or the actual signature of the Secretary?

A. It is the stamp signature.

Q. Is that his regular stamp signature?

A. Yes, it is the regular stamp used. It is regular office practice.

Mr. Jones: Mr. Yeager also admitted in the deposition as follows: It is admitted by defendant that section 105 (a) and (b) of the 1935 and 1937 constitution laws and by-laws, marked as exhibits 3 and 4 respectively, and sections 103, (a) and (b) of the 1939 constitution, laws and by-laws, marked as defendants exhibits 5, contain the same provisions; and that Section [99] 111 of the 1935 and 1937 constitution, laws and by-laws contain the same provisions as Section 109 of the 1939 Constitution, laws and by-laws, and that said provisions were in effect from the time the certificate was issued to Mr. Krussman up to the date of his death, said Sections reading as follows:

(Deposition of V. J. Pakes.)

Section 103. (a) The president and secretary of the Society shall appoint and may remove at will a financial secretary for each camp, who shall be paid at least the same compensation per member per month by the camp as has heretofore been paid to the Clerk by the local camp.

(b) The financial secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the camp dues and the sovereign camp fund payments and monthly installments thereof, and shall monthly pay the camp dues so collected to the banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the society to the secretary of the Society at the headquarters of the society as provided for in Section 109.

Section 109. On or before the fifth day of every month the financial secretary of each camp shall remit all the sovereign camp funds in his hands and all other funds [100] due the society to the secretary of the society. Such amounts shall be remitted in money order, certified check, bank cashier's check, or bank draft with exchange, payable to the order of the treasurer. Accompanying such remittance, the financial secretary shall also forward such

(Deposition of V. J. Pakes.)

detailed statement of the standing of the members in the camp as shall be required for the information of the secretary of the society, upon blanks furnished for that purpose.”

Q. You stated on direct examination that in the check that you forwarded as a refund for payment made from July 1939, to and including August 1940, that you deducted from the amount of the installments paid during that period the sum of \$10.55 which had been paid to him for gains and savings on his certificate in February, 1940.

A. That is correct.

Q. Will you explain what the gains and savings, you mention represent?

A. Those were savings during the preceding year that had accumulated from excess interest collected, and savings in management, expenses, and other items. There was distributed the sum of about \$1,100,000 among all members that had been members for two or more years, and the proportionate part on this certificate amounted to \$10.55.

Q. Can you state what amount you paid on the certificate of Mr. Krussman for the year 1939?

[101]

A. 1939 was also \$10.55

Q. \$10.55 when was that paid?

A. The check was issued on February 25, 1939.

Q. To whom was it transmitted.

A. It was transmitted to Eric A. Krussman.

(Deposition of V. J. Pakes.)

Q. Was there any letter accompanying it?

A. Yes, there was.

Q. May I see it? A. Yes.

Q. The savings and gains that you deducted had been paid to him in the year 1940 had they not? A. Yes.

Q. Was there a letter accompanying that?

A. Yes, there was

Mr. Jones: The defendant does not object to the plaintiff cross-examining witness with reference to these gains and savings. I guess that statement is not necessary in there because I stated I would make the witness my witness.

Q. I show you Mr. Pakes, what has been marked as Exhibit C, being a letter dated February 1, 1940, purporting to be from D. E. Bradshaw, President of the defendant Company and ask you if you recognize the signature on that letter.

A. I do.

Q. Whose signature is it?

A. It is the signature of D. E. Bradshaw, President of the [102] of the society.

Q. Do you know whether that letter, or a similar one was sent out to Eric A. Krussman on the date it bears, February 1, 1940?

A. Yes, such a letter was sent to him.

Q. State whether there was anything accompanying that letter? A. A check.

Q. Payable to whom?

(Deposition of V. J. Pakes.)

A. Check for \$10.55 payable to Eric A. Krussman, Pocatello, Idaho.

Q. Was that a check for the payment that you say was deducted from the check you forwarded, marked Exhibit 13?

A. That is correct.

Mr. Jones: We wish to have that check. This letter is marked exhibit C and we offer it in evidence.

Mr. Merrill: We object to it. It is immaterial for any purpose.

The Court: I don't know what is in the letter I will look it over now, and you may go on.

Q. Mr. Pakes I show you what has been marked as exhibit D, and will ask you to state, if you know what that is?

A. That is a distribution of savings check issued on February 1, 1940, payable to Eric A. Krussman.

Mr. Jones: May I have this check marked C, the first one, and then I desire to have this photostatic copy of check marked exhibit D.

[103]

Q. Is that the check that accompanied letter that was sent out with a letter similar to exhibit C?

A. Yes, that is the check that accompanied a letter similar to that marked Exhibit C.

Q. I will ask you to state whose signature D. E. Bradshaw is on the check, if you know.

A. D. E. Bradshaw is President, and Farrar Newberry is the Secretary.

(Deposition of V. J. Pakes.)

Mr. Jones: We offer in evidence Exhibit D, and ask Mr. Yeager if you will be willing to make a photostatic copy of this and send it along with the exhibits?

Mr. Jones: Mr. Yeager announced that it would be satisfactory, he said "that will be satisfactory, we will do that.

Mr. Jones: There will be no objection made to the photostatic copy being used the same as if the original was forwarded. Mr. Yeager said: "that is correct."

Q. I will show you Mr. Pakes, what purports to be a form letter bearing date February 25, 1939, and ask you if you know whose signature is signed to that letter marked exhibit E.

A. The signature is that of D. E. Bradshaw, President of the society.

Q. Do you know whether that letter was forwarded or letter similar to that was forwarded to Eric A. Krussman at [104] Pocatello?

Mr. Jones: We ask that the letter be marked as exhibit E.

The Court: Exhibit C seems to be a circular and it has authorized cash payment upon certificates in force two or more years, and says that check in herewith inclosed. Witness refers to this statement.

Mr. Merrill: My objection was that it is immaterial for any purpose. I assume that he

(Deposition of V. J. Pakes.)

wants to introduce it as an element of a waiver or estoppel, my position is that unless the one that sent that letter knew of his ill health, that this is immaterial.

The Court: I was thinking that the last paragraph of exhibit C would be admissible. The rest may be just a general circular but this refers to the check. I am letting this last paragraph in.

Mr. Jones: This is a letter written by the company or society and they said they sent one like this to Mr. Krussman.

The Court: Yes, that's true. I think I will admit exhibit c.

PLAINTIFF'S EXHIBIT No. C

Woodmen of the World
Life Insurance Society
Omaha, Nebraska

Office of the President

February 1, 1940.

Esteemed Sovereign:

On June 6th, 1940, Woodmen of the World
Will be 50 Years of Age!

We are as one in our pride in the great record of service to American families which our Society has made through the changing conditions of the past century. We see the

(Deposition of V. J. Pakes.)

spirit of fraternity running like a golden, unbreakable thread through all its efforts from the day its organization was announced by Joseph Cullen Root to the present time. In its more than 8,000 Camps the hands of brotherhood are extended during periods of sickness and distress, and in our sanatorium at San Antonio the ministry of healing is practised among those Sovereigns afflicted with tuberculosis.

Through prosperity and depression, war and epidemic, the Society's financial growth has paralleled its activities in the field of fraternalism. It has paid to living members and beneficiaries more than \$300,000,000, and its asset structure of over \$129,000,000 puts it in the front rank of insurance organizations in America.

Appreciation of these things can be best expressed through the cooperation of all members in the success of Golden Anniversary Campaign, which began January 1st and will end June 6th. This special endeavor covers a period when rejoicing over past accomplishments and pride in present strength may spur us to attend meetings of our Camps, to assist in the presentation of Anniversary celebration programs, and to urge our friends to join with us in membership.

(Deposition of V. J. Pakes.)

For your assistance in securing an application you will be presented, upon the completion of the membership, a Gold Lapel Wedge Pin. At the same time you will be helping your Camp to win a beautiful Golden Anniversary Banner. For particulars, see your field man or financial secretary.

Enclosed find Anniversary Coin Test, which you will wish to use and keep as a souvenir of the celebration, and an Emblem Sticker to place upon your car or office or home door or window for all to see.

Our Board of Directors has authorized the payment of a Cash Refund for the year 1939 upon certificates in force for two or more years, and check for yours is herewith enclosed.

Fraternally,

De E. BRADSHAW,

DEB:EW

President.

(Emblem)

(Emblem)

1890

1940

Golden Anniversary [237]

Mr. Jones: And we now offer exhibit D.

The Court: It is admitted.

Mr. Jones: Now read the answer to the last question.

(Deposition of V. J. Pakes.)

A. Yes, such a letter was sent, together with a check to [105] Eric A. Krussman on or about February 25, 1939.

Q. Was it sent by the defendant Company?

A. Yes.

Mr. Jones: Now, we offer exhibit E.

Mr. Merrill: Objected to as immaterial for any purpose whatever.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. E

Woodmen of the World
Life Insurance Society
Omaha, Nebraska

Office of the President

February 25, 1939

Esteemed Sovereign:

The Woodmen of the World was dedicated by its founders nearly half a century ago to the service of the American family through home protection and the application of the tenets of brotherhood. In times alike of prosperity and depression it has kept safely and steadily to these purposes, and its officers have directed its affairs in the interest of the members.

On account of economies effected in 1938 we are happily in position to make another refund

(Deposition of V. J. Pakes.)

to each of our members of over two years' standing, and yours is herewith enclosed.

Naturally we are proud of the recognition accorded the Society by insurance and other financial interests of the nation. And remember, our fraternal service has kept pace with our financial progress. At San Antonio, Texas, our free hospital continues to assist those members afflicted with tuberculosis, and it has recently won credit from the American College of Surgeons and the American Medical Association.

Our camps in ever greater numbers are extending the hand of brotherhood to their members and families in times of distress and need. They continue to enroll scores of thousands of new Sovereigns each year. A nation-wide movement is now being launched to be known as President's Recognition Campaign. Appreciating the confidence accorded, let me express the belief that many more thousands will be added to our rolls during this activity.

Never in our whole history has there existed such a spirit of loyalty and such manifest desire on the part of officers, Home Office employees, fieldmen and financial secretaries, and members generally to "work together" for the success and expansion of this institution.

Let me suggest that your continued support of the Society may be shown not only by speaking favorably of it to your friends, but in a

(Deposition of V. J. Pakes.)

very practical way (provided you are now in good health and under 60) by Increasing Your Own Protection in the W. O. W. If you now carry Ordinary Life, for instance, you may be interested in a certificate of one of our other forms as an addition.

We hope to hear from you shortly and enclose post card for your convenience.

Fraternally,

De E. BRADSHAW,

DEB:EW

President [238]

Q. The check you say that accompanied this letter was a check for what?

A. The check was also for distribution of savings accumulated in 1938 and distributed in 1939 to the members of the society.

Q. I show you what purports to be a check bearing the signatures of D. E. Bradshaw and Farrar Newberry, countersigned by Bess Cooper dated February 25, 1939, and ask you if you recognize that exhibit, marked exhibit F?

Mr. Jones: I ask that this be marked at this time as exhibit F.

A. Yes, I do.

Q. What is it?

A. It is a refund check for distribution of savings issued to Eric A. Krussman, Pocatello.

(Deposition of V. J. Pakes.)

Mr. Jones: Defendant makes no objection to witness testifying as to what the check is and what its terms are before its introduction.

Q. Whose signature do you recognize on that check? [106]

A. I recognize the signature of D. E. Bradshaw, President and Farrar Newberry Secretary, countersigned by Bess Cooper.

Q. Are those the signatures of the President and Secretary? A. They are.

Q. And the signature of Bess Cooper who countersigned it? A. Yes.

Q. Was that check sent with a form letter similar to exhibit E? A. Yes.

Q. And to whom was it sent?

A. It was sent to Eric A. Krussman, Pocatello, Idaho.

Q. Being the same Eric A. Krussman for which this action is brought? A. Yes sir.

Q. About when was it sent?

A. It was sent on or about February 25, 1939.

Q. What did the check represent?

A. It represents distribution of Savings accumulated in the previous year.

Q. For whom, in this particular case?

A. For Eric A. Krussman.

Mr. Jones: We offer in evidence exhibit F. May it be agreed that a photostatic copy of exhibit F may be made, and forwarded along

(Deposition of V. J. Pakes.)

with the exhibits, and that no question will be raised as to the fact that it is a photostatic copy? Mr. Yeager agreed to that.

The Court: Do you offer it now. [107]

Mr. Jones: Yes, we offer it now.

The Court: It may be admitted.

Q. I now show you, Mr. Pakes, what has been marked as exhibit F-1 for identification, purporting to be a letter dated February 25, 1938, and purporting to bear the signature of D. E. Bradshaw, and ask you if you recognize that? A. I do.

Mr. Jones: I wish to have it marked F-1

Q. What is it?

A. It is a letter sent out February 25, 1938 to members that participated in distribution of savings.

Q. You say it is a letter. It is an exact copy of similar letters that were sent out?

A. It is a form letter.

Q. Do you recognize the signatures?

A. I do.

Q. Whose signature is it?

A. That of D. E. Bradshaw, President.

Q. President of defendant society.

A. Yes.

Q. Do you know about when a similar letter was mailed to various certificate holders?

A. It was mailed on or about February 25, 1938.

Q. Was a similar letter sent to Eric A. Kruss-

(Deposition of V. J. Pakes.)

man, the holder of the certificate sued on in this action? A. It was. [108]

Q. Do you know whether anything accompanied the letter that was sent to Eric A. Krussman?

A. Yes, a refund check.

Q. You state that there was a check that accompanied the letter to Eric A. Krussman. I show you what has been marked exhibit H and ask if you recognize that as being the check that was forwarded to Eric A. Krussman? A. I do.

Q. What date does it bear?

A. February 25, 1938

Q. Do you recognize the signatures on that check?

A. I do. Signatures of D. E. Bradshaw President. Farrar Newberry, Secretary, countersigned by Bess Cooper.

Q. Are those genuine signatures of those officers and party?

A. Lithographed signatures, recognized by the bank and by our society.

Q. The figures \$10.55 appearing on that check represent what?

A. Represents the amount that was payable by this check.

Mr. Jones: I wish to have this marked as exhibit H. We now offer exhibits F-1 and exhibit H.

Mr. Merrill: We object to both the exhibits as being immaterial for any purpose. In addi-

(Deposition of V. J. Pakes.)

tion to the objection made to the previous exhibits I call Your Honor's attention to these two matters having to do with dates prior to any controversy that occurred here.

Mr. Jones: We were in arrears for some four [109] years that they allowed him to do this. We say that it is material, it did induce him to believe that they had waived any prompt payment clause. Of course, if they admit that he was in good standing, I will not pursue this.

The Court: I think I will admit it.

PLAINTIFF'S EXHIBIT No. F-1

Woodmen of the World
Life Insurance Society
Omaha, Nebraska

Office of the President

February 25, 1938

Esteemed Sovereign:

You will rejoice with us that, by continued economies in management, by favorable mortality experience, and as the result of a studied policy of careful investment we are enabled to hand you the enclosed Refund Check.

We may well be mutually happy over many evidences of the pronounced success of our beloved Society. Our assets, amounting to over \$125,000,000, are carefully serviced, periodically

(Deposition of V. J. Pakes.)

examined by experts, and show us to be in a remarkably strong position. Our reputation for the prompt payment of legitimate claims is attested by hundreds of letters from gratified beneficiaries. Our camps, equipped in 1937 membership campaigns with new paraphernalia for service, particularly in initiation, show an awakened and wide-spread interest in the cardinal purposes for which the institution was founded.

Our hospital property at San Antonio, Texas, has been greatly improved and our tuberculous guests have been made to feel more comfortable and more at home.

Our Radio Station WOW is a medium of increasing entertainment and information to our membership and the public, and serves to advertise the financial and fraternal strength of the Society.

Last March we wrote about 29,000 new members. I understand that a movement is now being launched under the title "President's All-Member Campaign," challenging the nationwide, uniform cooperation of our great membership, in which more thousands of applications will doubtless be secured, and that individual members assisting will be rewarded with valuable premiums. I am grateful for the compliment given me in the naming of this campaign, and predict most creditable results.

(Deposition of V. J. Pakes.)

With this check let us offer our sincere good wishes and the hope that the year 1938 may bring you all your heart desires of material and spiritual comfort.

Fraternally,

De E. BRADSHAW,

DEB: EW

President. [239]

Q. We again show you exhibit H, and ask you what that \$10.55 represents. Why was that paid?

Mr. Merrill: We object to that as immaterial.

The Court: Overruled.

A. It was the proportionate part of the savings accumulated in 1937 and distributed to all members that were entitled to it.

Q. Does the \$10.55 shown by this check represent the amount that was due Mr. Eric A. Krussman under his certificate for gains and savings?

A. Yes, it does.

Q. For the year 1937? A. Yes.

Mr. Jones: Again Mr. Yeager, you have no objection that I have asked him under cross examination these questions. Mr. Yeager said he had no objection.

Q. If I understood you correctly, Mr. Pakes, you stated that gains and savings on certificates

(Deposition of V. J. Pakes.)

were not distributed to any certificate holder until the certificate had been in force two years? [110]

A. Two years or more.

Q. Then there was none prior to that time distributed to Mr. Krussman?

A. That is correct.

Q. His certificate was taken out in September.

A. September 1935.

Q. Then it would be two years old on September 1937? A. That is correct.

Q. Under the rules, would he not be entitled to a portion of the year's gains and savings?

Mr. Merrill: Objected to as leading.

Mr. Jones: The stipulation waived any objection as to the form of the question. I will read the stipulation at this time.

“It is hereby stipulated and agreed by and between the above named parties, by and through their attorneys of record, that the depositions of Farrar Newberry, Secretary of Omaha Woodmen Life Insurance Society, of Omaha, Nebraska, and B. J. Pakes, Assistant Secretary of said Society, witnesses on behalf of the above named defendant, may be taken before Katherine V. Peterson, Notary Public in and for the County of Douglas, State of Nebraska on the fourth floor Insurance Building, Northwest corner of Seventeenth and Farnam Streets, Omaha, Douglas County, Nebras-

(Deposition of V. J. Pakes.)

ka, on Thursday, the 21st day of August, 1941, beginning at the hour of 10 o'clock A. M. of said day and [111] continuing until completed; that said depositions may be taken in shorthand, upon oral interrogatories and answers thereto, together with such exhibits as either party may tender, and that when so taken the same shall be transcribed and reduced to writing signed by the witnesses, and certified by the said Notary Public, and transmitted to W. D. McReynolds, Clerk of the above entitled Court, Boise, Ada County, Idaho; and the depositions, so taken, may be read by either party to the action as evidence on the trial of said cause, subject, however, to all legal objections and exceptions, except as to the form of the interrogatories, that could be taken in case the witness were personally present and testified at the trial, it being expressly stipulated and agreed that all technicalities and formalities in respect to the taking, subscribing, certifying and transmitting of said depositions are hereby waived, so that these depositions can be used for all purposes as if they had been fully complied with.

It is further stipulated that said defendant, following the taking of said depositions, may, if it so desires, also take the depositions of any other officer or agent of the defendant corporation who might be produced at said time and

(Deposition of V. J. Pakes.)

place as a witness or witnesses on behalf of said defendant, and that said deposition may be taken before the same Notary Public, [112] in the same manner and with like effect as the deposition of Farrar Newberry and/or B. J. Pakes, and thereafter transcribed, signed, certified and transmitted and used in the same way.

It is further stipulated that either party to this action may be represented in the taking of said deposition or depositions by counsel who may not be of record in this cause, and that counsel so taking said deposition may, by agreement, change the time and place for the taking thereof, or may make any other change with respect to said deposition as they may agree upon.

Dated this 8th day of August 1941."

And that is signed by attorneys representing both parties here.

The Court: Overruled.

A. No, he would not.

Q. The first time he became entitled was in 1938?

A. It was based on good standing as of December 1, 1937.

Q. Who was the financial secretary of camp number 7 at Pocatello, Idaho, during the time and after the time Mr. Krussman took out the

(Deposition of V. J. Pakes.)

certificate sued on up to the time of Mr. Krussman's death, if you know?

A. Basil Flemming.

Mr. Jones: I make Mr. Pakes my witness for these questions,—I have already announced to the Court that I was willing to make him my witness. [113]

Q. He was the financial secretary during the entire period of membership of Mr. Krussman?

A. Yes.

Q. Mr. Pakes, are monthly reports prepared in this office sent out in duplicate to your various financial secretaries?

A. Yes, they are prepared in this office and sent out to the financial secretaries with a duplicate.

Q. One of those is the duplicate retained by the financial secretary, and the original sent back in here with the money? A. Yes.

Q. Is it audited each month?

A. It is audited each month.

Q. I show you, Mr. Pakes, what has been marked as exhibit G for identification, and ask you if you recognize the endorsement upon that check?

A. I do.

Q. By whom was it endorsed?

A. It was endorsed by Morris Sheppard, Pacific Woodmen Life Association, John T. Yates, Sovereign Clerk.

(Deposition of V. J. Pakes.)

Q. Was that the proper endorsement of your society? A. It was.

Q. Do you know whether that check was received by the defendant? A. It was.

Q. About when was it received?

A. It was deposited April 7, 1936.

Q. Was it paid,—the check? [114]

A. The check was paid.

Q. Proceeds received by the defendant?

A. They were.

Q. What installment was it applied upon, if you know?

A. It was applied on installment Number 4 for April, 1936.

Q. Who was Morris Sheppard?

A. He was treasurer.

Q. Who audits the reports?

A. The Auditing department, various members of the auditing department.

Q. You, as Assistant Secretary, are familiar and knew that this check was received?

A. That is right.

Mr. Jones: I wish to have that marked as exhibit G. I will now offer it in evidence.

Mr. Merrill: Objected to as immaterial.

The Court: Admitted.

Mr. Jones: In order to shorten the record, a separate stipulation has been entered into and signed by the respective attorneys

(Deposition of V. J. Pakes.)

herein which may be introduced by either the plaintiff or defendant at the trial.

Q. Mr. Pakes, from an examination of the monthly reports of Basil Flemming, the financial secretary at Pocatello, Idaho, how many members were delinquent during the month of July, 1939?

[115]

Mr. Merrill: We object to this as being immaterial. I call attention to section 40-2331 of the Idaho Code annotated which is the same as section 20 Chapter 225 1911 session laws and provides: "The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." That is the statute, and the certificate they have introduced in evidence provides: "If the payments required by the constitution, laws and by-laws of the Association are not paid by the member, this certificate shall be null and void. Should this certificate become void for any cause, acceptance of any payment from or for the member, or other act by any camp officer or member of the Association thereafter, shall not operate as an estoppel

(Deposition of V. J. Pakes.)

or as a waiver of the terms of this contract.” Our position is this, that this has to do with the local camp, and if the local financial secretary or officers of local camp allowed payment by delinquent members, they didn’t have a right to do this and it would not be a waiver on the part of the sovereign camp in this type of matter.

The Court: I am going to allow this evidence [116] in and if I determine to rule otherwise I will strike all this evidence. I think I ought to receive the evidence at this time and then if I reach the conclusion as you are contending, then the record may show that I will strike the evidence.

A. The reports will show it.

Q. Does the report for the month of August show it is for the installment of July?

A. That is right.

Q. When was that report received?

A. It was received August 18, 1939.

Q. That report shows that the payments thereon were for the month of July?

A. Yes, July.

Q. You received the pay in your office here on August 18th? A. That is right.

Q. Can you tell from that report how many of those members paid during the month of July?

(Deposition of V. J. Pakes.)

A. We can tell. There are thirteen listed, of which three are reported for suspension, which makes remittance covering ten members.

Q. You cannot tell when that money for those installments were actually received by Bazil Flemming, your financial Secretary?

A. From this report?

A. Yes. [117] A. No.

Q. As far as you know from that report each and every member listed thereon may have paid the July installment in the month of August prior to the 17th day of August, 1939?

A. We could not tell from this report.

Mr. Merrill: It is understood that it goes in under that general objection and the statement made by the Court.

The Court: Yes.

Q. You do not know whether or not the ten that you mention on here, that are reported to have paid,—whether that money actually came into the hands of Bazil Flemming, the financial secretary in the month of July or the month of August, to the 17th? A. No.

Mr. Jones: There is no objection to my asking the Assistant Secretary, the witness on the stand, with reference to facts appearing in the reports without having offered the reports in evidence. Mr. Yeager said that there was no objection. That shows in the deposition.

(Deposition of V. J. Pakes.)

Q. Can you tell by examining the report that was received by you on July 19, 1939, for the installment of June, what portion, if any, of the payments listed thereon was received in July by the financial secretary?

A. No, I cannot tell from this report. [118]

Q. On what date was the report that we are considering which was received by you on July 19, 1939, made up by Bazil Flemming, the financial Secretary, as appears from the report?

A. It was made up for the installment for June.

Q. And certified by him on what date?

A. Certified by him on July 18, 1939.

Q. On the report made up by Bazil Flemming, the financial secretary, on July 18, 1939, it lists Eric A. Krussman as having paid \$11.70. Is that right?

A. That is right.

Q. For what installment?

A. For installment Number 6.

Q. Is it a fact that from the check shown in evidence that \$11.70 was not paid until the month of July? Is that true?

A. It was paid to the home office in the month of July.

Q. By check. A. Check 372.

Q. That is the check bearing date of July 18, 1939? A. Yes.

Q. In the report you received on July 19, 1939,

(Deposition of V. J. Pakes.)

Eric A. Krussman is listed under column 1 as a member of the society? A. Yes.

Q. Referring to the report of the financial secretary, Bazil Flemming, that report was received by you on January 22, 1940, was it not? [119]

A. Yes.

Q. It listed Eric A. Krussman as a member of the Order at that time? A. Yes.

Q. This report as you have heretofore testified is made up by your home office?

A. That part of it which is printed.

Q. That lists the members? A. Yes.

Q. Then the report for the next month, the month of January 1940, which would be for the first installment, when would that be mailed out, if you know?

A. It was due here on the fifth day of February, but it was received here on the 21st day of February.

Q. Do you know when it was mailed out?

A. It is signed by Bazil Flemming on the 17th day of February.

Q. According to the constitution, laws and by-laws of the company, the financial secretary is required to return those reports not later than the fifth day of the month.

A. They are due here on the fifth day of the month.

Q. But it is a fact that they were never received by you until the middle or latter end of the month,

(Deposition of V. J. Pakes.)

and that was true during practically all the time Mr. Krussman held his certificate with the defendant?

A. I think that has been the practice.

Q. There are not instances that you know during that time [120] when the monthly report was received by you as early as the fifth of the month?

A. Without consulting the records I could not say.

Q. I wish you would consult your records for at least two years prior to the death of Mr. Krussman and indicate whether any of those reports were received before the fifth day of the month.

A. None of those reports for 1939 and 1940 were received on the fifth day of the month.

Q. On or before the fifth day of the month?

A. No.

Q. Most of them were received around the——

A. The 18th or 19th.

Q. Do you know, or can you tell how many members were delinquent in the camp at Pocatello, camp number 7, during the month of July, 1940?

A. I cannot tell from these reports. I would have to consult the records in the auditing department.

Q. Could you state whether there was a substantial number of them?

A. Not a substantial number, there might be three or four.

(Deposition of V. J. Pakes.)

Q. You knew that Mr. Eric Krussman, from the checks he forwarded here, was delinquent for a long period of time, did you not?

A. I would not know that. [121]

Q. Would you not know from the check?

A. We would not examine the check.

Q. The check would be listed, would it not?

A. It would.

Q. The date of it. A. No.

Q. You would not pay any attention as to whether a check was given the month following or after the last day of the month for the payment of the installment falling due in that month?

A. No, we would not.

Q. Through whose hands would these checks pass?

A. The checks pass only through the hands of the Cashier.

Q. Then your secretary and treasurer do not know about the affairs of the business?

A. They could not know all the details, there are 350,000 members. These members are listed every month, and they could not examine every one of those checks.

Q. Was not your Treasurer on these checks I have shown you, and which have been introduced in evidence? It appears the stamp of the company was placed on them to acknowledge them,—endorsements. A. Yes.

(Deposition of V. J. Pakes.)

Q. To whom was authority given to cash checks and endorse the name of the company? [122]

A. The checks are deposited in the bank by the cashier.

Q. By the cashier of the company.

A. Yes.

Q. Then the cashier could observe the date the check was drawn, if he cared to do so.

A. Yes, if he cared to do so.

Q. You delegate that authority to him to endorse the checks. A. No.

Q. Who endorses them?

A. The bank has authority to endorse our checks.

Q. What banks?

A. The Omaha National Bank.

Q. You delegate to the bank the right to endorse your checks? A. Exactly.

Q. Then the bank, of course, record that check and know the date, would it not,—various checks?

A. I doubt if they would record both the check and the date. I am quite sure they do not record any dates.

Q. What record do they keep?

A. They keep the record of the amount of the check.

Q. Of all foreign checks,—do they keep a record of them?

A. Those are the mechanics of the bank, and I do not know.

(Deposition of V. J. Pakes.)

Q. But you do know that Eric Krussman was late all of these years, do you not?

A. Only when he was reported on the report.

[123]

Q. He was reported late on the reports from time to time. A. Yes.

Q. You knew he was in default ever since 1936. Did you? A. No, I would not know that.

Q. Do any of your reports show that he was in default in 1936?

A. I would have to look through them. On report for installment number 10, received here on November 17, 1936,—received here on November 17, 1936, he was reported for failing to pay the current installment.

Q. Under your instructions to the financial secretary on the monthly report it is requested that remittances be forwarded how, to your company?

A. They are supposed to be reported by money order, express order, certified check, cashier's check, payable to the treasurer of the society.

Q. But Mr. Krussman never did comply with any of those requirements?

A. They were personal checks.

Q. You always accepted his personal checks.

A. Yes.

Q. All of his installments were paid by personal checks. Is that not true?

A. Except—some were not.

(Deposition of V. J. Pakes.)

Q. With the exception of two checks that were cashed by Mr. Flemming. A. Yes. [124]

Q. Were any of these checks transmitted by Mr. Krussman to Mr. Flemming ever returned to him with the request that Mr. Flemming get a bank draft? A. Not so far as I know.

Q. The auditor of the company went over these reports each month? A. Yes.

Q. Who was the auditor?

A. They change around.

Q. On the report received by you on the 17th day of November 1936, it is provided that on or before the fifth day of each month the financial secretary of the camp must furnish the secretary of the Pacific Woodmen Life Association, Omaha, Nebraska, with a detailed statement of the standing of the members of the camp. Do you know whether your financial secretary gave you detailed reports of the standing of the members?

A. Yes, he did.

Q. He did that from time to time.

A. Every month.

Q. Then your company knew the standing every month of the members of the society in camp number 7.

A. Yes, as they were given in the monthly reports of the financial secretary.

Q. Could you tell from the checks of Mr. Krussman, if you [125] had cared to examine them, that he was not paying his installments before the end of the month for that particular month?

(Deposition of V. J. Pakes.)

A. I suppose, if we had examined the checks we could.

Q. You paid some compensation to the financial secretary, didn't you?

A. Only for persistency of his business.

Q. What do you mean by persistency of his business?

A. New business that has been written and put on the books which has been maintained in good standing.

Mr. Merrill: I will object to this business of the financial secretary upon the ground that it is incompetent, irrelevant and immaterial for any purpose his duties are fixed by the constitution, the laws and the by-laws of the Company and set out in the certificates and they cannot be altered or changed.

The Court: That is one of the main questions in the case. I will let this go in the same as the other evidence.

Q. Is it not a fact you allowed special compensation? How much would you pay for putting new business on the books?

Mr. Merrill: May my objection go to this line of testimony.

The Court: Yes.

A. He was allowed a certain schedule of compensation, [126] according to the certificates that were in force, according to the amount of cer-

(Deposition of V. J. Pakes.)

tificates that were in force.

Q. That would be for making up his reports and keeping them.

A. I am speaking only of the business that has recently been put on, not for old business.

Q. Would he get the same as any other agent who wrote up new business? A. No.

Q. This compensation you paid was not for writing new members. A. It was not.

Q. It was for keeping the old members on.

A. The system of compensation for this persistent business has been changed from time to time. There was a time they were paid for four years; then there was a time when they were paid for two years; and there was a time when they were paid for net increase in the camp.

Q. It is a fact you paid him compensation for certain of his work.

A. You refer to Mr. Flemming.

Q. Yes.

A. I would have to look it up to see if he really got compensation. I do not know if he had any business that came in under that provision.

Q. He did get some compensation during that time. Did he not? [127]

A. He got some in 1938 and '39 and '40.

Q. I show you what has been marked exhibit I, and ask you to state, if you know, what it is?

Mr. Jones: I will ask to have the Clerk mark this as exhibit I.

(Deposition of V. J. Pakes.)

A. That is the monthly report of the financial secretary of the camp.

Q. It is for what month?

A. It covers installment No. 11, for the year 1938.

Q. Is there anything on it that indicates when it was received by defendant?

A. Yes, it was received on December 22, 1938.

Q. There are some pencil notations on it.

A. The pencil notations on the right side of the report indicate the amount of remittance and the kind of remittance.

Q. When was that put on?

A. It was put on on the date it was received in the cashier's Department, December 22, 1938.

Q. Put on at the home office?

A. Yes, at the home office.

Q. Do you observe in those pencil notations anything that indicates there was a personal check there?

A. Personal check 64 for \$11.85. Another personal check for \$10.82.

Q. Is Eric Krussman listed as a member on that report? [128] A. He is.

Q. What was the monthly rate?

A. His monthly rate was \$11.70.

Q. Is that indicated under column 3?

A. Yes.

Q. Is a similar report to that sent out each month and received by the various camps?

(Deposition of V. J. Pakes.)

A. Yes, it is.

Mr. Jones: We offer in evidence exhibit K.

Mr. Yeager: We have no objection.

The Court: Do you offer it now.

Mr. Jones: Yes, we offer it now, and at the time of the taking of the deposition there was no objection.

The Court: Admitted.

PLAINTIFF'S EXHIBIT NO. K

[Title of District Court and Cause.]

STIPULATION FOR TAKING
DEPOSITIONS

It Is Hereby Stipulated and Agreed by and between the above named parties, by and through their attorneys of record, that the depositions of Farrar Newberry, Secretary of Omaha Woodmen Life Insurance Society, of Omaha, Nebraska, and B. J. Pakes, Assistant Secretary of said Society, witnesses on behalf of the above named defendant, may be taken before Katherine V. Peterson, Notary Public in and for the County of Douglas, State of Nebraska, on the Fourth Floor, Insurance Building, Northwest corner of Seventeenth and Farnam Streets, Omaha, Douglas County, Nebraska, on Thursday, the 21st day of August, 1941, beginning at the hour of 10 o'clock

(Deposition of V. J. Pakes.)

A. M. of said day and continuing until completed; that said depositions may be taken in shorthand, upon oral interrogatories and answers thereto, together with such exhibits as either party may tender, and that when so taken the same shall be transcribed and reduced to writing, signed by the witnesses, and certified by the said Notary Public, and transmitted to W. D. McReynolds, Clerk of the above entitled Court, Boise, Ada County, Idaho; and the depositions, so taken, may be read by either party to the action as evidence on the trial of said cause, subject, however, to all legal objections and exceptions, except as to the form of the interrogatories, that could be taken in case the witnesses were personally present and testified at the trial, it being expressly stipulated and agreed that all technicalities and formalities in respect to the taking, [241] subscribing, certifying and transmitting of said depositions are hereby waived, so that these depositions can be used for all purposes as if they had been fully complied with.

It is further stipulated that said defendant, following the taking of said depositions, may, if it so desires, also take the depositions of any other officer or agent of the defendant corporation who might be produced at said time and place as a witness or witnesses on behalf of

(Deposition of V. J. Pakes.)

said defendant, and that said deposition may be taken before the same Notary Public, in the same manner and with like effect as the deposition of Farrar Newberry and/or B. J. Pakes, and thereafter transcribed, signed, certified and transmitted and used in the same way.

It Is Further Stipulated that either party to this action may be represented in the taking of said deposition or depositions by counsel who may not be of record in this cause, and that counsel so taking said deposition may, by agreement, change the time and place for the taking thereof, or may make any other change with respect to said deposition as they may agree upon.

Dated this 8th day of August, 1941.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff,

Residing at Pocatello, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

RAINEY T. WELLS, A.L.M.

Residing at Omaha, Nebraska

Attorneys for Defendant.

[Endorsed]: Filed Oct. 15, 1941. [242]

(Deposition of V. J. Pakes.)

Q. I show you what has been marked as exhibit J, purporting to be a letter to Mr. Bazil Flemming from Farrar Newberry, Secretary, and ask you to examine it and state if the signature on that letter is the signature of Farrar Newberry, the Secretary? A. It is.

Q. You are the assistant to the Secretary.

A. Yes sir.

Q. The party who puts that on is authorized to stamp that signature on there?

A. That is correct. [129]

Q. There are various individuals in the home office who have the authority to stamp that signature? A. They have.

Q. Wherever it appears on letters sent out to your financial secretaries, it indicates the letter is a genuine letter from the secretary's office. Wherever that signature appears, is it authorized?

A. That is right.

Mr. Jones: We offer exhibit J.

Mr. Merrill: Objected to as immaterial.

The Court: Admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT NO. J

Omaha Woodmen Life Insurance Society
Omaha
Nebraska

December 30, 1938

7 Idaho

Mr. Basil Fleming, F. S.,
236 No. 12th St.,
Pocatello, Idaho.

Esteemed Sovereign:

Your report for installment No. 11 for the year 1938 has been audited and we find there is an over-remittance of \$1.27 on it.

You show as the total collection of your report the amount of \$43.80. You remit \$45.07, which causes the over-remittance of \$1.27 on this report. Deducting this amount from your previous debit balance of \$2.31 leaves a debit of \$1.04.

Special compensation in the amount of 75 cents was recently credited to your account, and deducting this amount from the above mentioned debit balance of \$1.04 leaves your account now showing a debit balance due from you of 29 cents, which amount kindly include thru line 6 of the summary when rendering your next regular report.

(Deposition of V. J. Pakes.)

Enclosed please find report list for installment No. 12 for the year 1938.

Fraternally yours,
FARRAR NEWBERRY,
Secretary. [240]

Mr. Jones: That is all the cross and now I read what is shown as redirect examination.

Redirect Examination

Mr. Merrill: He is still your witness.

Mr. Jones: All right, I will continue with the examination.

Q. Mr. Pakes, you identified and testified on cross examination to certain refunds which were made to Mr. Krussman, one being February 1938, one February 1939, and one February 1940. Would you explain a little more fully to whom distributions were made, and in what manner it was determined to whom distributions should be made?

A. The distribution was made to all members who have been continuously in membership for two years or more, and were in good standing to the end of the years for which [130] these checks refer. The amounts were determined actuarially, and distributed according to form of certificate, amount of certificate, amount of actual contribution, an-

(Deposition of V. J. Pakes.)

nual assessment and amount of reserve accumulated on these certificates.

Mr. Jones: I will omit to nearly the bottom of page 37, second question from the bottom.

Q. In other words, a person who becomes suspended before the date upon which the distribution was made and remained suspended would not be entitled to the distribution for that particular year?

Mr. Merrill: Now we object to that, this renders the deposition unintelligible leaving out a full page and reading only the one question. The question starts with "in other words." Unless the entire testimony is given it is misleading.

Mr. Jones: He may read it if he wants it in.

Mr. Merrill: It is unintelligible because it presupposes a condition.

The Court: I think Mr. Merrill is correct on that.

Mr. Jones: Let it go for the present. Now I will omit the deposition down to page 42, the first question under what is designated as

Recross Examination

Q. Mr. Pakes were there any such certificates at the local [131] camp in Pocatello, Idaho, which you have referred to?

Mr. Merrill: Objected to as immaterial, confusing and unintelligible.

(Deposition of V. J. Pakes.)

The Court: Sustained.

Mr. Jones: Reserving the right, if they go into any of these matters with this witness, that I may go into the matter further, I believe that is all.

Mr. Merrill: You are through with the deposition.

Mr. Jones: With the reservation I stated.

The Court: You may have that right. We will recess now until morning at 10 o'clock.

10 o'Clock A. M., October 23, 1941

Mr. Jones: I desire at this time to read the agreement in the stipulation between the parties relative to taking this deposition,—

Mr. Merrill: We object to the reading of this again, it is entirely immaterial.

Mr. Jones: I read a portion of it yesterday.

The Court: I thought this stipulation was read into the record yesterday.

Mr. Merrill: Yes, and we object now, it would be taking up the time of the court and is entirely immaterial.

The Court: It is a part of the record in the case.

Mr. Jones: Then at this time we offer in [132] evidence the stipulation entered into on the 8th day of August 1941 between the attorneys for the plaintiff and the attorneys for the defendant. I will ask that it be marked, and

(Deposition of V. J. Pakes.)

now I will offer in evidence exhibit K which is the stipulation to take the deposition.

The Court: It is admitted, of course.

Mr. Jones: That is all, of this witness or deposition.

Mr. Merrill: I want to make this observation: while this deposition of Mr. Pakes was originally taken by one of counsel for plaintiff, Mr. Jones has used it as his deposition, or the deposition of his witness, he has omitted certain parts which I assume he felt were not helpful to him. Now, as to whether these omitted parts may be considered as being in the record, or should it be presented by us when we commence our side of the case. It seems to me that it would be more helpful to the Court to have it in at one time, and if so I will go ahead with the deposition.

The Court: I think your stipulation covered the provision that either party may use any part of the deposition.

Mr. Merrill: That is right.

The Court: Then I suppose you may use any part you desire. [133]

Mr. Jones: It occurred to me that it might be better if he introduced what part of the deposition he desires at this time.

The Court: I think perhaps it is a good idea to keep the whole deposition together, and introduce it at one time.

(Deposition of V. J. Pakes.)

The following was read by Mr. Merrill, as cross examination.

Cross Examination

Mr. Merrill: On page two of the deposition there was an answer to the question: "Q. Has there been any change in the character of the society, along with the change in the name?" and the answer was that there was none. I don't think the next was read into the record.

Q. Will you please state what is the character of the society what type of society is the defendant?

A. The Omaha Woodmen Life Insurance Society is a fraternal benefit society organized under the laws of Nebraska, having a lodge system, ritualistic form of work, representative form of government, and conducted solely for the mutual benefit of its members, and not for profit.

Q. Mr. Merrill: The question at the bottom of page four of the deposition was asked and answered. I will read the questions and answers, at the top of page 4 of the deposition. [134]

Q. In addition to the \$11.70 was he required to pay anything to the local camp?

A. Yes, there were certain local camp dues.

Q. Is that fixed by the local camp?

A. Yes, sir, it is fixed by the local camp.

Mr. Merrill: At the bottom of page 4 the question was read, and answered: "If you

(Deposition of V. J. Pakes.)

know, was the claim for death benefit approved or rejected," and the answer was that the claim was rejected. I will start from that answer.

Q. Will you state why the claim was rejected?

Mr. Jones: That is objected to, it calls for a conclusion of the witness.

The Court: Overruled.

A. The claim was rejected because Mr. Krussman was automatically suspended by reason of information contained in the death proofs that he was at the time of attempting to again become a member, in ill health.

Q. Mr. Pakes, had he failed to pay any installments which were required?

A. The installments were paid, but they were not paid in proper,—in due time.

Q. When was he required to make payment of his monthly installments?

A. The monthly installments were due on the first of the month, with a grace period until the last day of the [135] month.

Q. Mr. Pakes, I hand you what purports to be a carbon copy of a letter addressed to Harry E. Krussman dated November 14, 1940, and ask if it is a part of the records and files of the society in your possession, and ask if the original of that letter was mailed to Mr. Krussman?

A. Exhibit 10 is a carbon copy of a letter sent to Mr. Harry E. Krussman under date of Novem-

(Deposition of V. J. Pakes.)

ber 14, 1940, and it is a copy of the letter that was actually forwarded to Mr. Harry E. Krussman.

Mr. Merrill: At the taking of the deposition Mr. Jones said that plaintiff admitted that Harry E. Krussman received the original of exhibit 10.

Defendant offers exhibit 10 at this time.

Mr. Jones: We object to that portion of the exhibit which sets forth any conclusions or reasons on the part of the party writing the letter. We have no objection at this time to the fact, which shows that tender refund, but we object to that part of the letter which states anything other than the rejection of the claim.

Mr. Merrill: We offer the whole letter.

Mr. Jones: Objection also that it is a self serving declaration.

The Court: Overruled, it is admitted.

(Deposition of V. J. Pakes.)

DEFENDANT'S EXHIBIT NO. 10

November 14, 1940.

Mr. Harry E. Krussman
Twin Falls, Idaho

Dear Sir:

Re: Eric A. Krussman, deceased
Certificate No. TE-1321001

Claim under the above numbered benefit certificate issued by this Society on the life of your father, the late Eric A. Krussman, has been rejected on the ground that he was under suspension at the time of his death, and upon all other grounds on which the Society may be found to be entitled to deny liability under the certificate, he having become suspended by reason of the fact that the July, August, September, October, November and December installments of the year 1939, and the January, February, March, April, May, June and July installments of the year 1940 were not paid by your late father to the Financial Secretary of the local camp on or before the last days of those months in which the installments were due on account of the benefit certificate.

Under the agreements contained in the application, the terms and conditions of the benefit certificate, and the provisions of the Constitution, Laws and By-Laws of the Society, all of which were a part of the contract between

(Deposition of V. J. Pakes.)

the Society and your father, the late **Eric A. Krussman**, each monthly installment of the annual payment on this certificate became due on the first of each calendar month, and when he failed to make payments of these installments on or before the last days of the months in which the installments were due, he became suspended, and the certificate became null and void.

The Constitution, Laws and By-laws of the Society in force and effect when the late **Mr. Krussman** became suspended specifically provided that a suspended person must be in good health when delinquent installment or installments are paid by or for him, and that he must remain in good health for thirty days thereafter in order to revive the benefit certificate which he had held and be restored to beneficiary membership thereunder. We have before us evidence constituting positive proof that the late **Eric A. Krussman** was not in good health when the delinquent installments subsequent to No. 6 for the month of June of the year 1939 were paid, therefore the payments under the provisions of the Constitution, Laws and By-laws of the Society as hereinbefore cited did not have the effect of reviving the above numbered benefit certificate which he had held, and the Society incurred no liability under the certificate by reason of **Mr. Kruss-**

(Deposition of V. J. Pakes.)

man's subsequent death on August 2, 1940, while under suspension.

Enclosed you will find Refund Warrant No. 10-54080 payable to your order in the amount of \$153.25, the amount remitted to the Secretary of the Society covering delinquent installments for the months of July, 1939 to July, 1940, inclusive, and installment No. 8 for the month of August, 1940, less the amount of refund or distribution of savings check issued and released by the Society February 1, 1940, payable to the order of your late father in the amount of \$10.55, representing gains and savings effected by the Society which would have been apportionable to the above numbered benefit certificate had payment of the installment thereon been made regularly and in due time and the certificate continued in force and effect.

In denying liability for death benefit under certificate No. TE-1321001 on the above ground, the Society does not waive any [252] other grounds on which it may be found to be entitled to deny liability thereunder.

Very truly yours,

CLAIM DEPARTMENT

By:

hwm/mlf

encl. [253]

(Deposition of V. J. Pakes.)

Q. Mr. Pakes, it appears in this letter that the installments [136] of assessment commencing with the month of July 1939 to and including August 1940, were tendered to Harry E. Krussman. Do you know if that tender was made, warrant issued and delivered to Mr. Krussman?

A. Yes, tender was made and check delivered.

Q. Less an amount of distribution of savings which was paid to him in February 1940?

A. Yes.

Mr. Merrill: Mr. Jones read the next few questions and answers down to the middle of page 6.

Q. Mr. Pakes, I hand you a note or letter dated August 25, 1939, from Bazil Flemming, and ask you if the remittance for the month of July 1939 was received with that letter marked exhibit 11?

A. Exhibit 11 is the original letter of Bazil Flemming the financial secretary, letter transmitting \$11.85 being a payment for E. A. Krussman for the month of July 1939 received at the office on August 28, 1939.

Q. When Exhibit 11 was received, did it have thereon any of the notations made in ink or stamps?

A. The notations in ink and stamp were made at this office.

Q. Do you have any information as to the date the payment of the July 1939 installment was made to Bazil Flemming the financial secretary? I mean

(Deposition of V. J. Pakes.)

the date Mr. Krussman paid the July installment?

[137]

Mr. Merrill: Down to the middle of page 7 was read.

Q. As I understand it, that covered fourteen installments, less \$10.55 which was deducted by reason of the distribution which had been made subsequent to the date you say he was suspended?

A. The check covers the said installments, less \$10.55 which was a check for the distribution of savings dated February 1, 1940.

Mr. Merrill: Now, we go to the second question on page 8 of the deposition.

Q. Mr. Pakes, as I understand it, you said Mr. Krussman became suspended August 1, 1939, by reason of his failure to pay the July 1939 installment on or before the last day of that month. Will you please state if there is any provision in the certificate or constitution, laws and by-laws in effect at that time requiring payments to be made before the last day of the month?

A. There is a provision in the constitution and laws and I believe it is section 63.

Q. You say Section 63.

A. Yes, I believe it is section 63.

Q. I hand you the constitution and ask you

(Deposition of V. J. Pakes.)

what section 63 provides in the event a member does not pay his installment before the last day of the month in which it [138] becomes due.

A. Section 63 provides for automatic suspension of a member if he fails to make payment on or before the last day of the month.

Q. Mr. Pakes, referring to the same exhibit, is there any provision therein providing that a person may reinstate his membership after suspension, and condition upon which reinstatement may be had?

A. Yes, there is a provision for such person to renew his contract with the society, if he is in good health.

Q. Would you mind reading that section as a part of your evidence?

A. "Section 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the society by the payment of the delinquent installment or installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter. Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member,

(Deposition of V. J. Pakes.)

and to contract that such installments when so paid after he has become suspended for not [139] making payments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

Q. Mr. Pakes, as I understand from this section, if a member attempts to reinstate within three months from the date of suspension, he may do so by the payment of the delinquent installments, if he is then in good health?

A. That is a fact. He must be in good health and warrant that he will remain in good health for thirty days after such payment.

Q. That provision was in effect on August 24, 1939? A. It was.

Q. Has it been in effect from 1935 up to and including 1939?

A. Yes, it was in effect for that period.

Q. Mr. Peaks, when installments are remitted to the society after the suspension of a member, do you make any inquiry as to the condition of the health of the member? A. No.

Q. Are you required to do so? [140]

(Deposition of V. J. Pakes.)

Mr. Jones: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

A. No.

Q. Did you, or so far as you know, any other officer of the society have any knowledge of the condition of Mr. Krussman's health on August 24, 1939? A. No.

Q. When did you first receive information that Mr. Krussman was not in good health on August 24, 1939?

A. That condition was developed in the proofs of death.

Q. Then as I understand it, you had no knowledge of the condition of his health on August 24, 1939, until after his death?

A. That is right.

Q. Mr. Pakes, is there any provision in the constitution, laws and by-laws concerning the authority of a financial secretary of a local camp to change, alter or waive any of the provision of the constitution, laws and by-laws?

A. There is a provision. Section 82 of the constitution, laws and by-laws in effect September 1, 1937, provides that no officer, employee or agent of the society or the sovereign camp has power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, waive any of the provisions of the Constitution, laws and by laws. [141]

(Deposition of V. J. Pakes.)

Mr. Jones: That is objected to on the ground that it is not the best evidence.

The Court: If you have the constitution in evidence it would not be the best evidence. The objection is sustained.

Mr. Merrill: We would like to read the parts of the constitution which provide for this. There is a provision of the constitution which provides that no officer, employee or agent of the society of the sovereign camp has power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, waive any of the provisions of the constitution, laws and by-laws.

The Court: But counsel understands that is not a quotation of the constitution and the constitution is in evidence. Objection sustained.

Mr. Merrill: Exception.

Q. Will you refer to section 109, sub section (g) and please read that provision.

A. Section 109, sub-section (g) provides: "Section 109 (g). The financial secretary shall not by acts, representations or waivers, nor shall the camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the constitution, laws and by-laws of this society nor to bind the society by any such acts." [142]

Q. Will you explain the duties of the financial secretary in connection with receipt and transmis-

(Deposition of V. J. Pakes.)

sion of assessment paid by members to the secretary of the society?

A. The financial secretary,—one of his duties is to remit all money to the home office paid to him by the members.

Q. How about his duty concerning the receipt of the money? Is the member required to pay the financial secretary, or is he required by the constitution to make any collections?

Mr. Jones: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

A. The member is required to pay to the financial secretary. There is no duty involved on the part of the financial secretary that he should make the collections.

Q. As you understand the constitution, laws and by-laws, what governs the standing of a member,—the payment to the financial secretary, or the receipt of the assessment or installments of assessments by the Secretary of the Society?

Mr. Jones: Objected to as calling for a conclusion of the witness, it is all set out in the constitution and by-laws and what his understanding is would merely be a conclusion. [143]

Mr. Merrill: We call attention to the stipulation which counsel has called to our attention here, and we feel that he is not entitled to in-

(Deposition of V. J. Pakes.)

voke such objection. Had such objection been made at the taking of the deposition the constitution could have been quoted at that time.

Mr. Jones: We did not waive our right to object to these matters.

The Court: Now let the Court understand this. I understand that the constitution and by-laws prescribe the duties of the financial secretary.

Mr. Merrill: They do in part at least.

The Court: The Court will permit this subject to the understanding that if it is contrary to the by-laws and of course, the court will have to decide that.

Mr. Jones: That can be determined.

Mr. Merrill: Yes, by a thorough search of the constitution and by-laws.

The Court: That seems to be one of the questions to be put up to me. I have to decide that. I don't think that I should take his opinion on this matter. You are asking him now, what you are going to ask the Court. If the Constitution prescribe the duties of this financial secretary that would be the best evidence and I will have to read that. I will sustain the objection. [144]

Mr. Merrill: May I read the answer for the record.

The Court: Yes.

(Deposition of V. J. Pakes.)

A. The payment of the assessment or installments of assessment to the financial secretary.

Q. In the actual practice of the society, is the same thing true? A. Yes.

The Court: You understand that if all of this is within the constitution I am not sustaining the objection.

Mr. Merrill: Now, for the purpose of clarity only, I will ask it again.

Q. As you understand the Constitution, laws and by-laws what governs the standing of a member,—the payment to the financial secretary, or the receipt of the assessment or installments of assessment by the secretary of the society?

A. The payment of the assessment, or installments of the assessment to the financial secretary.

Q. In the actual practice of the society, is the same thing true? A. Yes.

Q. Would the fact that the financial secretary fail to make his remittance and camp report to the secretary of the society within the time required by the constitution, [145] laws and by-laws, have any effect upon the standing of an individual member of that camp, if he had in fact paid his installment to the financial secretary as required?

A. If he made the payment to the financial secretary of his camp, it would have no effect on his standing and the validity of his certificate.

(Deposition of V. J. Pakes.)

Mr. Merrill: Now, I go to page 36 of the deposition, the first question and answer was read into the record, under the redirect examination. I will start with the second question on the redirect examination.

Q. As I understand it then, you determine to whom the distribution is to be made from the records of the society as to the members who have paid their installments to a certain date; that is, you base that entirely upon the records as you receive them from the financial secretary.

A. That is correct.

Q. The dates of payment of Mr. Krussman have been testified and also a stipulation entered into as to the dates of these payments, some of which were paid after the last day of the month, and if it should develop that certain payments had been made after the last day of the month, and that Mr. Krussman had been suspended, although your records do not show that, what would be your practice in a case of that kind?

Mr. Jones: Objected to as calling for a conclusion of the witness based upon a hypothetical question. [146]

The Court: Overruled.

A. We would accept the payment and take it for granted the payment had been made in time.

Q. On that basis would you make the distribution?
A. We would.

(Deposition of V. J. Pakes.)

Q. You have testified also that in making tender of refund of assessments to the beneficiary under the certificate of Mr. Krussman you deducted from the amount paid the sum of \$10.55 which was paid to him on February 1, 1940 as a distribution of savings and gains. Will you explain that deduction? The reason for it?

A. The deduction was simply made because of the fact that later on it was developed that Mr. Krussman was improperly or illegally reinstated.

Mr. Jones: We move to strike that as a conclusion of the witness that he was improperly and illegally reinstated.

The Court: Of course, counsel understands that this is not binding on the Court. That is one of the ultimate questions to be decided here. It may stand.

Q. Mr. Pakes was that because he did not pay the July installment of 1939 before the last day of that month?

A. You refer to the deduction of that amount?

Q. Yes. A. I would say it was.

Q. In other words, a person who becomes suspended before the [147] date upon which the distribution was made and remained suspended would not be entitled to the distribution for that particular year?

Mr. Jones: I shall have to object on the ground that it calls for a conclusion of the witness.

(Deposition of V. J. Pakes.)

The Court: As I have stated, this of course, is a matter that the Court will have to decide. I will permit it to go in for the present time. It is an opinion of the witness. I will admit it now subject to a ruling later on whether it should be stricken out. I have to hear you on this matter. I will permit it to go in with that understanding.

A. That is correct. He would not be entitled to a distribution.

Q. Do you base your records as to membership or suspension entirely upon the reports which you receive each month from the financial secretary?

A. We do.

Q. On cross examination you testified that from time to time it was reported by Basil Flemming, the financial secretary of camp seven at Pocatello, Idaho, that Mr. Krussman had failed to pay his installments. Do you have a record of the times such reports were made? A. Yes we have.

Q. In addition to the reports themselves, did you as a part of your record have a card record showing those failures to pay? [148]

A. Yes, membership cards show such information.

Q. Mr. Pakes, I hand you card which has been marked exhibit 18. Is that the card record which you say you kept of the membership of Eric A. Krussman?

(Deposition of V. J. Pakes.)

A. That is correct. That is the membership card of Eric A. Krussman.

Q. Will you please explain the notations appearing thereon which you say indicate the months in which Mr. Krussman did not pay his installment during the month in which it was due in accordance with the report of the financial secretary?

A. This card shows the dates of delinquency, reinstatement etc., advance payments, also.

Q. Please state which monthly installments the card shows as not having been paid.

Mr. Jones: Objected to on the ground, first, that the card is not the best evidence, it was not the record of the financial secretary at Pocatello. Second; it is an attempt to show by testimony what the card shows without having it in evidence.

The Court: For the present the objection is sustained.

Mr. Merrill: We offer it in evidence at this time.

The Court: It may be admitted. [149]

A. The date of suspension is November 1, 1936, showing nonpayment of the October installment; June 1, 1937 for non-payment of May installment of 1937; and July 1, 1937 showing non-payment of June installment; August 1, 1937 indicating suspension for non-payment of July installment. Here is date of October 1, indicating suspension for non-

(Deposition of V. J. Pakes.)

payment of September installment, and here is August 1, 1939, date of suspension, indicating non-payment of July installment of 1939, and date of August 1, 1940, indicating suspension for non-payment of the July installment of 1940.

Q. What is the next line underneath?

A. The next line shows the date of reinstatement.

Q. Explain each of those notations.

A. December 1, 1936, shows that delinquent installment of October 1936 was paid and reinstatement is dated December 1, 1936; next date showing suspension of June 1, 1937 for non-payment of installment of May, reinstatement being dated July 1, 1937; July 1, 1937 suspension for non-payment of June installment shows a reinstatement on August 1, 1937, and August 1, '37 suspension for non-payment of July installment shows a reinstatement on October 1, '37; and October 1, 1937 suspension for non-payment of September installment, reinstatement was dated November 1, 1937; suspension of August 1, '39 for non-payment of July 1939 installment, reinstatement [150] was made on August 29, '39; suspension of August 1, 1940 for non-payment of July installment shows a reinstatement on August 9, 1940.

Q. Mr. Pakes, when you spoke about reinstatement, did you mean by that, that is an entry as to when you received payment of that installment, or about the time you received it?

(Deposition of V. J. Pakes.)

A. It is about the time. It is not the date of the actual receipt of the payment, except the last one, which was dated August 29, '39, which I believe is the actual date the payment was received here.

Q. Are the notations of reinstatement subject to conditions of reinstatement set out in the constitution, laws and by-laws to which you testified on direct examination?

Mr. Jones: Objected to on the same ground, that it is calling for a conclusion of the witness.

The Court: It goes in under the same ruling.

A. That is right.

Q. On cross examination, Mr. Pakes, you testified concerning a detailed report of the standing of members required and made by financial secretaries. Do you receive any other detailed statement than the regular monthly report with reference to which you have testified?

A. There were some special remittances which are slightly different than the regular report. Those are remittances that are received between the due dates of the [151] regular reports.

Q. Are the regular monthly reports which you have examined and testified concerning referred to as the detailed statements required? A. Yes.

Q. Do those reports always indicate the date upon which payments were made to the financial secretary?

(Deposition of V. J. Pakes.)

A. No, they do not indicate that information.

Q. Mr. Pakes, at the time you received these reports to which you testified, did you have any knowledge of the condition of the health of the members who were reported as having paid?

A. No.

Q. You have testified that certain installments have been made after the last day of the month, and in that connection has a member, or has he not, the right under the terms of the constitution, laws and by-laws to pay a monthly installment after the last day of the month?

Mr. Jones: Objected to as calling for a conclusion.

The Court: The same ruling.

A. He has.

Q. Under what conditions does he have the right to pay an installment after the last day of the month?

Mr. Jones: Objected to as calling for a conclusion.

The Court: The same ruling. [152]

A. He must be in good health.

Q. When a payment is made to the financial secretary after the last day of the month and remitted to the society, is that installment accepted by you as secretary of the society as if the member

(Deposition of V. J. Pakes.)

never had been suspended, or is it accepted as a payment for the purpose of reinstatement?

Mr. Jones: Objected to as calling for a conclusion of the witness.

The Court: The same ruling.

A. It is received for the purpose of reinstatement.

Q. You have previously testified concerning Section 65, may I ask if a member has failed to pay a monthly installment during the month in which it is due, and pays it within three months, such assessment or installment of assesment is accepted under your authority as provided in Section 65 of the constitution, laws and by-laws which is in evidence?

Mr. Jones: Objected as it asks for this witness's interpretation of what the constitution and by-laws are.

The Court: Ruling is reserved on that. The answer may go in at this time.

A. That is correct.

Q. You testified on cross examination that probably a number of members of Camp No. 7, Pocatello, Idaho, [153] paid installments after the last day of the month. Do you know if under any of the certificates issued by the Society there is any provision made for advancing installments for delinquent members from the cash surrender value of such certificate?

(Deposition of V. J. Pakes.)

A. Yes, under certain certificates there is such a provision.

Q. Was there any such provision in the certificate held by Mr. Krussman? A. No.

Q. If I understand your answer to the last two interrogatories, then it would not necessarily follow that because a person failed to pay an installment on the type of certificate mentioned that he would become suspended by reason of such failure, would it? A. No, it would not.

Q. If a person held a certificate providing for an automatic installment loan, and that person's certificate had a cash value, then the payment would be advanced by the society. A. It would.

Q. No suspension would result?

A. That is correct.

Q. And his failure to pay the monthly installment under such circumstances would not effect a suspension. Is that correct?

A. That is correct. [154]

Mr. Merrill: That is all we offer of the deposition.

The following read by Mr. Jones.

Recross Examination

Q. Mr. Pakes, were there any such certificates at the local camp in Pocatello, Idaho, which you have referred to?

A. Certificates with the automatic premium loans?

(Deposition of V. J. Pakes.)

Q. Yes. A. I am quite sure there were.

Q. Will you look at this one for April, 1940, and indicate which of those had such certificates?

A. This report does not indicate the type of certificate these members held.

Q. Can't you tell from the monthly rate?

A. Not exactly, not having the amount of insurance, the age of the member, I would not be able to tell from these rates the type of certificate held.

Q. You would not say any of them held such certificate on that report there?

A. I would say that as a general run they would not all be term certificates. Some would be ordinary life or some other type of insurance.

Q. Will you tell me what Ralph Bistline's certificate was?

A. No, without the office record I could not tell.

Q. If I understand you, Mr. Pakes, the defendant company [155] has no way of determining whether its members are in default?

A. Except from the monthly reports.

Q. You never make any inquiry to your financial secretary regarding that fact? A. No.

Q. In so far as the general officers of the Company, they pay no attention as to dates of checks that are sent in to the Company to pay installments?

A. We rely entirely on the monthly report the financial secretary sends us.

(Deposition of V. J. Pakes.)

Q. That is true, notwithstanding the fact that your financial secretary is instructed not to send check to the company in payment of installments?

A. There is not any direct instruction he shall not send in checks.

Q. Does not the financial secretary's report instruct him what to send?

A. Yes, but it does not say he should not send personal checks.

Q. It does list what he shall send?

A. Yes.

Q. It does not list personal checks?

A. It does not say anything about personal checks.

Q. Referring to plaintiff's exhibit 18, can you state whether such exhibits shows the July installment was [156] delinquent? A. It does.

Q. Does it show the August installment was delinquent? A. It does.

Q. Does it show that the September installment was delinquent? A. It does.

Q. Does it show that the October installment was delinquent?

A. It does not show the October installment was delinquent.

Q. You have no personal knowledge then as to who examined the checks that were sent in by Krussman? A. No.

Q. But they were received by the General offices for payment of his installment?

(Deposition of V. J. Pakes.)

A. They were.

Mr. Jones: The following agreement between counsel was the portion I wanted to read into the record yesterday.

The Court: The entire stipulation is in as an exhibit now.

Mr. Jones: That is all of the deposition.

Mr. Merrill: My attention was called to the fact that I overlooked offering exhibit 11 and I now offer it in evidence.

The Court: It may be admitted.

DEFENDANT'S EXHIBIT No. 11.

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Camp 7 Idaho		(———)
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Krussman 39/7—Paid		

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236 No. 12" St.
Pocatello, Idaho

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Special Remittance
By G. P. B. Auditor

Ans—G. G. R.

(not readable)

[254]

Mr. Jones: I assume that we may refer to any part of the constitution in our arguments or briefs.

[157]

The Court: Either side may do that.

Mr. Merrill: We will agree to that.

Mr. Jones: We have had marked a stipulation plaintiff's exhibit 19, and we would like to have the clerk mark each of the checks, they are attached to this stipulation, with the same exhibit number as appears thereon at the present time.

The Court: Very well.

Mr. Jones: We now offer in evidence Plaintiff's exhibit 19, together with the exhibits attached thereto and referred to therein.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. 19.

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated Between the plaintiff by his Attorney, T. D. Jones, and the Defendant by its Attorney, George Yeager, who is assistant to the General Attorney for the Defendant, that the facts herein set out, together with the Exhibits hereto attached and referred to herein may be introduced in evidence by either the Plaintiff or Defendant herein without further proof thereof:

That Exhibit G-1, being the check drawn by E. A. Krussman on May 12, 1936, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on May 15, 1936, and applied by Defendant in payment of the installment for the month of May, 1936.

That Exhibit G-2, being the check drawn by E. A. Krussman on June 15, 1936, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on June 16, 1936, and applied by defendant in payment of the installment for the month of June, 1936.

That Exhibit G-3, being the check drawn by E. A. Krussman on August 8, 1936, in favor of Pacific Woodmen, for the sum of \$24.10, was received by the defendant on August 10, 1936, and applied by defendant in payment of the installment for the months of July and August, 1936. [243]

That Exhibit G-4, being the check drawn by E. A. Krussman on September 10, 1936, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on September 14, 1936, and applied by defendant in payment of the installment for the month of September, 1936.

That Exhibit G-5, being the check drawn by E. A. Krussman on November 28, 1936, in favor of Bazil Fleming for Pacific Woodmen, in the sum of \$12.05, was cashed by him and the proceeds transmitted to the society, the defendant above named, and applied in payment of the installment for the month of October, 1936.

That Exhibit G-6, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman, on December 14, 1936, in favor of Bazil Fleming, in the sum of \$12.05, was cashed by Bazil Fleming, Financial Secretary of the above named defendant, and the proceeds transmitted to said defendant, and applied by defendant in payment of the installment for the month of November, 1936.

That Exhibit G-7, being the check drawn by E. A. Krussman on January 15, 1937, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on January 19, 1937, and applied by the defendant in payment of the installment for the month of December, 1936.

That Exhibit G-8, being the check drawn by E. A. Krussman on February 12, 1937, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on February 24, 1937, and applied by defendant in payment of the installment for the month of January, 1937.

That Exhibit G-9, being check drawn by E. A. Krussman on March 20, 1937, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on March 22, 1937, and applied by defendant in payment of the installment for the month of February, 1937. [244]

That Exhibit G-10, being check drawn by E. A. Krussman on April 17, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on April 21, 1937, and applied by defendant in payment of the installment for the month of March, 1937.

That Exhibit G-11, being the check drawn by E. A. Krussman on May 17, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on May 18, 1937, and applied by defendant in payment of the installment for the month of April, 1937.

That Exhibit G-12, being the check drawn by E. A. Krussman on June 20, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on July 16, 1937, and applied by defendant in payment of the installment for the month of May, 1937.

That Exhibit G-13, being the check drawn by E. A. Krussman on August 3, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on August 10, 1937, and applied by defendant in payment of the installment for the month of June, 1937.

That Exhibit G-14, being the check drawn by E. A. Krussman on October 6, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on October 20, 1937, and applied by defendant in payment of the installment for the month of July, 1937.

That Exhibit G-15, being the check drawn by E. A. Krussman on October 14, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on October 20, 1937, and applied by defendant in payment of the installment for the month of August, 1937.

That Exhibit G-16, being the check drawn by E. A. Krussman on November 12, 1937, in favor of Pacific Woodmen for the sum of \$23.70, was received by the defendant on November 18, 1937, and [245] applied by defendant in payment of the installment for the months of September and October, 1937.

That Exhibit G-17, being the check drawn by E. A. Krussman on December 12, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on December 16, 1937, and applied by defendant in payment of the installment for the month of November, 1937.

That Exhibit G-18, being the check drawn by E. A. Krussman on January 17, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on January 20, 1938, and applied by defendant in payment of the installment for the month of December, 1937.

That Exhibit G-19, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on February 16, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on February 18, 1938, and applied by defendant in payment of the installment for the month of January, 1938.

That Exhibit G-20, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on March 19, 1938, in favor of Pacific Woodmen, for the sum of \$11.85 was received by the defendant on March 21, 1938, and applied by defendant in payment of the installment for the month of February, 1938.

That Exhibit G-21, being the check drawn by E. A. Krussman on April 15, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on April 18, 1938, and applied by defendant in payment of the installment for the month of March, 1938.

That Exhibit G-22, being the check drawn by E. A. Krussman for E. A. Krussman on May 14, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on May 17, 1938, and applied by defendant in

payment of the installment for the month of April, 1938. [246]

That Exhibit G-23, being the check drawn by Mrs. E. A. Krussman, for E. A. Krussman on June 16, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on June 17, 1938, and applied by defendant in payment of the installment for the month of May, 1938.

That Exhibit G-24, being the check drawn by E. A. Krussman on July 19, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on July 21, 1938, and applied by defendant in payment of the installment for the month of June, 1938.

That Exhibit G-25, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on August 10, 1938, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on August 18, 1938, and applied by defendant in payment of the installment for the month of July, 1938.

That Exhibit G-26, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on September 19, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on September 23, 1938, and applied by defendant in payment of the installment for the month of August, 1938.

That Exhibit G-27, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on

October 15, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on October 17, 1938, and applied by defendant in payment of the installment for the month of September, 1938.

That Exhibit G-28, being the check drawn by E. A. Krussman on November 15, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on November 17, 1938, and applied by defendant in payment of the installment for the month of October, 1938.

That Exhibit G-29, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman, on December 16, 1938, in favor of Morris Sheppard, Secy. P. Woodmen, for the sum of \$11.85, was [247] received by defendant on December 22, 1938, and applied by defendant in payment of the installment for the month of November, 1938.

That Exhibit G-30, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on January 13, 1939, in favor of Morris Sheppard, Secy. Pacific Woodmen, for the sum of \$11.85, was received by the defendant on January 20, 1939, and applied by defendant in payment of the installment for the month of December, 1938.

That Exhibit G-31, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on February 18, 1939, in favor of Pacific Woodmen, for the sum of \$11.85, was received by

the defendant on February 20, 1939, and applied by defendant in payment of the installment for the month of January, 1939.

That Exhibit G-32, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on March 18, 1939, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on March 23, 1939, and applied by defendant in payment of the installment for the month of February, 1939.

That Exhibit G-33, being the check drawn by E. A. Krussman on April 15, 1939, in favor of W. O. W., for the sum of \$11.85, was received by the defendant on April 18, 1939, and applied by defendant in payment of the installment for the month of March, 1939.

That Exhibit G-34, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman, on May 17, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on May 19, 1939, and applied by defendant in payment of the installment for the month of April, 1939.

That Exhibit G-35, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on June 15, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on June 19, 1939, and applied by defendant in payment of the installment for the month of May, 1939. [248]

That Exhibit G-36, being the check drawn by E. A. Krussman on July 18, 1939, in favor of

Morris Sheppard, for the sum of \$11.85, was received by the defendant on July 19, 1939, and applied by defendant in payment of the installment for the month of June, 1939.

That Defendant's Exhibit 12, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on August 24, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on August 28, 1939, and applied by defendant in payment of the installment for the month of July, 1939.

That Exhibit G-38, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on September 16, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on September 19, 1939, and applied by defendant in payment of the installment for the month of August, 1939.

That Exhibit G-39, being the check drawn by E. A. Krussman on October 18, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on October 23, 1939, and applied by defendant in payment of the installment for the month of September, 1939.

That Exhibit G-40, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on November 17, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on November 20, 1939, and applied by defendant in payment of the installment for the month of October, 1939.

That Exhibit G-41, being the check drawn by Beatrice Ginzel for E. A. Krussman on December 16, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on December 18, 1939, and applied by defendant in payment of the installment for the month of November, 1939.

That Exhibit G-42, being the check drawn by Beatrice Ginzel for E. A. Krussman on January 19, 1940, in favor of [249] Morris Sheppard, for the sum of \$11.85, was received by the defendant on January 22, 1940, and applied by defendant in payment of the installment for the month of December, 1939.

That Exhibit G-43, being the check drawn by Beatrice Ginzel for E. A. Krussman on February 17, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on February 21, 1940, and applied by defendant in payment of the installment for the month of January, 1940.

That Exhibit G-44, being the check drawn by Beatrice Ginzel for E. A. Krussman on March 18, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on March 19, 1940, and applied by defendant in payment of the installment for the month of February, 1940.

That Exhibit G-45, being the check drawn by Beatrice Ginzel for E. A. Krussman on April 15, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant

on April 18, 1940, and applied by defendant in payment of the installment for the month of March, 1940.

That Exhibit G-46, being the check drawn by Beatrice Ginzel for E. A. Krussman on May 21, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on May 22, 1940, and applied by defendant in payment of the installment for the month of April, 1940.

That Exhibit G-47, being the check drawn by Beatrice Ginzel for E. A. Krussman on June 18, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on June 20, 1940, and applied by defendant in payment of the installment for the month of May, 1940.

That Exhibit G-48, being the chcek drawn by Beatrice Ginzel for E. A. Krussman on July 17, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on July 19, 1940, and applied by defendant in payment of the installment for the month of June, 1940. [250]

That Exhibit G-49, being the check drawn by Beatrice Ginzel for E. A. Krussman on August 1, 1940, in favor of Morris Sheppard, for the sum of \$23.70, was received by the defendant on August 8, 1940, and applied by defendant in payment of the installments for the months of July and August, 1940.

It is agreed that the monthly rate of installment on the certificate of Eric A. Krussman was \$11.70, and that whenever a monthly payment in excess of \$11.70 was paid, the amount in excess of \$11.70 was credited back to Bazil Fleming, Financial Secretary of Camp No. 7 at Pocatello, Idaho, to be applied on Mr. Eric A. Krussman's local camp dues.

It is further agreed that all of the checks referred to in the Stipulation were duly endorsed by the defendant Society, with the exception of Exhibits G-6 and G-7, and all of said checks and payments were delivered to Bazil Fleming, Financial Secretary of Camp No. 7, Pocatello, Idaho, and by him forwarded to the Secretary of the defendant.

Dated this 22nd day of August, 1941.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff

Residence and Post Office

Address: Pocatello, Idaho.

RAINFY T. WELLS

By GEORGE YEAGER

GEORGE YEAGER

Attorneys for Defendant

Residence and Post Office

Address: Omaha, Nebraska.

[Endorsed]: Filed Oct. 15, 1941. [251]

Mr. Jones: I desire at this time to read this into the record, we have offered exhibit 19 together with exhibits marked as follows: First, may it be understood that the reporter can copy this into the record to save time here.

The Court: Yes, if it is agreed.

Mr. Merrill: I don't see any necessity of that.

Mr. Jones: I want to have it before the Court.

The Court: It has been admitted, it is before the Court now.

Mr. Jones: The exhibits which are attached and to which I refer are marked exhibits G-1 to g-49 both inclusive.

The Court: Very well. [158]

Mr. Jones: I understand they are all in evidence.

The Court: Yes, I have ruled twice on that.

Mr. Jones: I want to be sure they are in the record.

The Court: So far as this record is concerned it is all in. I have ruled twice now.

BEATRICE GINZEL

Being called as a witness on behalf of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. State your name? A. Beatrice Ginzel.

Q. You are a daughter of the late Eric A.
Krussman? A. I am.

Q. Where were you living prior to and at the
time of his death. With reference to where he was
living. A. At the same place.

Q. How long had you been living there?

A. About a year and a half.

Q. Were you acquainted with Basil Flemming?

A. Yes sir.

Q. The financial secretary of the defendant in
this case. A. Yes sir.

Mr. Merrill: Object to the statement that he
[159] financial secretary of the defendant. He
was the secretary of the local camp and not of
of the defendant company.

Mr. Jones: I suppose the Court will decide
that question.

The Court: You are asking this witness to
testify as to his capacity. Sustained.

Q. You were acquainted with Basil Flemming?

A. Yes sir.

Q. You may state whether or not you saw him
come to the place where your Father and you were
living at any time prior to your father's death?

(Testimony of Beatrice Ginzel.)

Mr. Merrill: Objected to as immaterial
The Court: Overruled.

A. Yes sir, he came every month to collect.

Q. Collect what?

A. The payment on his insurance.

Q. Do you remember when your Father was stricken with the stroke? A. In July 1938.

Q. Do you know whether from that time on that Mr. Flemming came to the house to collect the dues or assessments? A. Yes sir.

Mr. Merrill: I make the same objection here as to the fact that it is immaterial as to what knowledge Bazil Flemming may have had, it is not imputed [160] to the defendant and would not bind the defendant.

The Court: She may answer. I see this is one of the questions that I have to dispose of and I will allow it and reserve ruling at this time. If I find that it is improper I will strike it. We will take the testimony now.

Q. Were you there from the time of his first illness in July 1938? A. No sir.

Q. Would you know as to Mr. Flemming coming to collect during the time you were not there?

A. No sir.

Q. What time did you know that Bazil Flemming came to the house to collect the monthly installments?

(Testimony of Beatrice Ginzel.)

A. I was there for nearly two months after he was sick and then back off and on at different times until we came back to stay.

Q. The Court wants to know when you were there.

A. I came back in November,—November 27, 1939.

Q. Were you there steadily after that?

A. All of the time.

Q. That was the period that you knew that he came? If you were there, then that is the period you knew that he came, is that true?

A. Yes, sir.

Q. Do you know who drew the checks when he came there? [161]

Mr. Merrill: That is objected to as immaterial, the checks would be the best evidence.

The Court: Overruled.

A. Yes.

Q. Who. A. I did.

Q. All of them?

A. From the time I came back in November.

Q. You may state whether or not Mr. Krussman, your father, was present when Mr. Flemming would come?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. Yes, Dad was present.

Q. Do you know whether any discussion was ever had between Basil Flemming and your Father

(Testimony of Beatrice Ginzel.)

with reference to your father's condition at any time?

Mr. Merrill: Objected to as immaterial and incompetent for any purpose.

The Court: Overruled.

A. Yes sir, they did.

Q. You may state generally what was said about his health.

Mr. Merrill: Objected to, it would be hearsay, incompetent, irrelevant and immaterial.

The Court: I am reserving ruling on the authority and conduct of this secretary, for the time being I will overrule this objection.

[162]

Mr. Merrill: I object further that there is no time or place fixed, no foundation laid.

The Court: Probably the time and place should be fixed.

Q. I will ask you if you know when the checks that you wrote were dated with reference to the time Mr. Flemming would call?

A. On the date he called.

Q. Was that true in every instance?

A. Yes sir.

Q. When would these conversations be held between your Father and Mr. Flemming with reference to his state of health?

A. On the date he came for the checks.

(Testimony of Beatrice Ginzel.)

Q. Do you observe from exhibit 19, and the exhibit attached as G 41 and can you tell who wrote that check? A. I did.

Q. What date was it?

A. December 16, 1939.

Q. Can you state whether Mr. Flemming was there at that time or not? A. Yes, he was.

Q. When would these conversations occur between your Father and Mr. Flemming with reference to the health of your father.

A. When he came to get the checks. [163]

Q. What was said at any of those times?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid and hearsay.

The Court: I am reserving ruling. She may answer at this time.

A. He would ask how he was,—how he was feeling and they would have a general discussion about his health, they would sit and talk for half an hour and sometimes longer.

Q. In examining exhibit 19 and the exhibits attached to it, can you tell when you first started to write checks to Mr. Flemming?

Mr. Merrill: Counsel has apparently discontinued the examination touching the health of her father and I move that everything the witness has testified to in that regard be stricken because it is incompetent, irrelevant

(Testimony of Beatrice Ginzel.)

and immaterial and hearsay, and for the further reason that there has been given no facts or information touching his health. It may have been good or bad.

The Court: I am reserving ruling on the motion to strike out the testimony
(no answer to the question asked)

Q. After your father had the stroke in 1938 in July, when was the first time you knew Basil Flemming, or saw him.

A. The next day. [164]

Q. Where was your father at that time?

A. In bed.

Q. What was his condition, generally?

A. He was sick.

Q. You may state if there was any portion of his body that was affected, that would be observed by anybody?

A. Yes, his right arm and leg that could be easily seen.

Q. Did he improve after the stroke?

A. Yes sir.

Q. Did he remain at home after that?

A. No sir.

Q. Where did he go?

A. He came to Nampa, Caldwell and went to Seattle twice.

Q. Do you know whether he was driving in a car?

(Testimony of Beatrice Ginzel.)

A. Yes sir, he had a permit to drive.

Q. You say that you first came to the home, when, that is to stay steadily?

A. November the 27th.

Q. You had been there between your father's stroke and that time? A. Yes sir.

Q. Where were you living before you went there to stay with him permanently?

A. We came from Caldwell.

Q. Did you at the time you were living there,—prior to the time you lived there permanently, see Mr. Flemming [165] receive any check from the house? A. I don't remember that.

Mr. Jones: That is all.

Cross Examination

By Mr. Merrill:

Q. Mrs. Ginzel, I think you said your Father,—strike that please,—. In view of your Honor's ruling or reserved rulings, I feel that I should cross examine and I want to do so without prejudice at this time.

The Court: Certainly.

Q. Mrs. Ginzel, you stated that *you* father sustained a paralytic stroke? A. Yes sir.

Q. In July 1938? A. Yes sir.

Q. What time in July did he have that stroke?

A. I think it was the 20th.

Q. Where was he at that time?

A. Out on the lawn.

(Testimony of Beatrice Ginzel.)

Q. Where was he living at that time?

A. At the Riverview.

Q. What do you mean by that?

A. At his home.

Q. That is the hotel apartment on the river bank here in Pocatello? A. Yes sir. [166]

Q. He was the owner of that property and was operating it at the time he took this stroke?

A. Yes sir.

Q. Where were you living?

A. I was at Nampa.

Q. You came down immediately.

A. I had been down and went home the day before.

Q. And came back. A. Yes sir.

Q. When did you get here after your Father's stroke? A. The next afternoon.

Q. How long did you remain?

A. Until school started in September.

Q. During all of that time, he was confined to his bed.

A. Not all of that time, he was up and took a few steps before I went home.

Q. He suffered a paralytic stroke?

A. Yes sir.

Q. On his right side. A. Yes sir.

Q. How long was he unconscious?

A. About a week.

Q. His speech was affected? A. Yes sir.

Q. His general condition was seriously affected?

[167]

(Testimony of Beatrice Ginzler.)

A. Yes sir.

Q. He never fully recovered?

A. Yes, I think he did.

Q. His right arm never recovered?

A. He got so he could write with it.

Q. It was always drawn up? A. No sir.

Q. He limped always?

A. He walked with a limp.

Q. His leg was affected?

A. He got around on it.

Q. He used a cane and crutches. A. No.

Q. He used a cane considerable. A. No.

Q. He limped. A. He limped a little.

Q. He suffered another stroke. A. Yes sir.

Q. When was that stroke?

A. In July 1940.

Q. He never recovered from that.

A. No sir.

Q. He died a few days later?

A. A few weeks later.

Q. About August the second. [168] A. Yes.

Q. He took the second stroke July 24, 1940.

A. Around there.

Q. Was he in the hospital at any time?

A. No sir.

Q. Always at the Riverview Hotel?

A. Yes sir.

Q. If he wasn't in a crippled condition Mr. Flemming would never notice anything.

A. Yes he could tell.

(Testimony of Beatrice Ginzel.)

Q. Tell what?

A. Tell by his arms and legs that he had been affected.

Q. Every time Mr. Flemming came over, by looking at your father you could tell he was sick.

A. No sir.

Q. Did he talk about his health with Mr. Flemming always?

A. I don't know that he always did, but sometimes he did.

Q. When Mr. Flemming came to see your father he could tell he was sick, do you mean that?

A. Yes sir.

Q. That was every time he came, he could tell he was sick?

A. Dad wasn't there all of the time?

Q. Every time he was there Mr. Flemming could tell he was sick?

A. Yes, I think so.

Mr. Merrill: That is all [169]

Redirect Examination

By Mr. Jones:

Q. Mr. Merrill asked if your father owned the Riverview hotel. A. Yes, he did.

Q. It was heavily mortgaged wasn't it?

Mr. Merrill: Objected to as immaterial.

Mr. Jones: This question was asked for the purpose of showing that he owned this property, now I want to show the actual condition.

(Testimony of Beatrice Ginzal.)

Mr. Merrill asked, was he the owner of this property.

The Court: There was an answer given here.

Mr. Jones: He lived at the property, that's true.

The Court: What difference does it make to the issues here. I don't understand that it could make any difference what property he owned. Sustained.

Q. Did I understand you to say that Mr. Fleming could always tell about your Father's improvement, and when he came there, by looking at him he could tell that he was still sick?

A. Yes, I think so.

Mr. Jones: That is all

Mr. Merrill: Yes, that is all.

MARION KRUSSMAN

Being called as a witness on behalf of the [170] plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones.

Q. State your name?

A. Marion Alice Krussman.

Q. How old are you? A. Sixteen.

Q. You are the daughter, the youngest daughter of Eric A. Krussman? A. Yes, sir.

(Testimony of Marion Alice Krussman.)

Q. Where were you living when your father first became sick, Marion?

A. At the same place he was, at the Riverview.

Q. Were you there at the time he was first afflicted? A. Yes, sir.

Q. When was it?

A. That was in July, about the 20th, 1938.

Q. When did you see him first after he was afflicted?

A. Just as immediately as we discovered it.

Q. Do you know whether, what his mental condition was right after his stroke?

Mr. Merrill: Objected to as calling for a conclusion of the witness and no foundation is laid and it is improper examination.

Mr. Jones: They brought out that he was [171] in a coma for a week.

The Court: Overruled.

A. Mentally he was just the same, I remember he wasn't in a coma, he wasn't unconscious. They gave him hypos to put him to sleep.

Q. Did you talk to him right after?

Mr. Merrill: Objected to that would be hearsay incompetent, and immaterial for any purpose.

The Court: She may answer.

A. Yes, sir.

Q. Did you live there at the apartment with your Father from that time on?

A. Yes sir, I did.

(Testimony of Marion Alice Krussman.)

Q. Where had you been living prior to that time? A. The same place.

Q. Did you know Mr. Bazil Flemming?

A. Yes, I did.

Q. Where did you first get to see or know him?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Jones: It is preliminary.

A. He came monthly to collect the insurance money.

Mr. Merrill: Move to strike the answer as not responsive.

The Court: It may be stricken.

Q. You may state where you first began to know Mr. Flemming? [172]

A. At our home.

Q. Do you know whether he came there from time to time? A. Yes sir.

Q. State what he came for?

Mr. Merrill: That calls for a conclusion of the witness and is incompetent, irrelevant and immaterial for any purpose.

The Court: Ruling reserved.

A. He came for the purpose of collecting the insurance monthly payments.

Q. Do you know whether he did collect them?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. Yes sir he did collect them.

(Testimony of Marion Alice Krussman.)

Q. In what form were they paid or handed to him? A. Personal check.

Q. Did you ever make any of these checks yourself?

A. Yes sir, I recall making the face of two of the checks and Father would sign them.

Q. Handing you exhibit 19 can you go over them and state which two checks you made?

A. These two (indicating)

Q. Just name them by the exhibit number.

A. Exhibit G 28 and G 36.

Q. You made those two checks. [173]

Mr. Merrill: Objected to leading and repetition.

The Court: It may be leading, sustained.

Q. State what you know about these two checks. What you know about them?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

Q. To whom were they given.

A. One in 1938 and one in 1939. I wrote the face of both of them on Father's checks.

Q. What dates?

A. November 15, 1938 and July 13, 1939.

Q. Do you know what became of those two checks that you testified about?

Mr. Merrill: Objected to as calling for a conclusion and is one of the questions for the Court.

The Court: I will reserve ruling.

(Testimony of Marion Alice Krussman.)

A. I was there and I wrote them and my father signed them and he gave them to Mr. Flemming both times for payment of the policy.

Q. After the first stroke describe his condition as you saw it from that time on?

A. He was confined to his bed at first for a month or six weeks and then he sat up. He improved so he could walk and then he wrote some, and he liked to drive and the Doctor gave him a permit and he secured a license to drive. He drove his car for his own amusement. He [174] did improve a great deal. I was very close to my Father.

Mr. Merrill: I move to strike that part as to her father improving a great deal as being a conclusion, and as to the Doctor giving permission to drive as a conclusion and not the best evidence.

The Court: Motion granted as to the permit unless she knows.

Q. Were you there when this Doctor was with him and gave permission to get a license?

A. I was with him when he got the license. He had to have the Doctor's permit to get it.

Mr. Merrill: Move to strike that last portion of that answer.

The Court: It may be stricken.

Q. You may state how often you saw Mr. Flemming come to your home during the period that you have testified to.

(Testimony of Marion Alice Krussman.)

A. After the stroke.

Q. Did you see him before?

A. Yes sir, I saw him off and on, I cannot say how many times. After the stroke I have the proof of two times by the checks and I saw him other times but often when he was there I could have been in school.

Q. You were attending school?

A. Yes sir.

Q. After your father had the stroke I will ask you if he [175] wrote any checks and which they were?

Mr. Merrill: Objected to as calling for a conclusion and no foundation laid.

Mr. Jones: Withdraw it.

Q. Do you know your Father's signature?

A. Yes sir.

Q. Referring to exhibit 19, at dates subsequent to the date of your father's stroke, state if you observe any of those checks having been signed or written by him?

Mr. Merrill: There is no charge that anyone was forging these checks, and all this is immaterial.

The Court: Overruled.

A. Exhibit 33,—G 33 was written by father, the face and signature, the whole check, and exhibit 99.

Q. That was since the stroke.

A. Yes sir. There was just this once that I wrote them and he signed it.

(Testimony of Marion Alice Krussman.)

Mr. Merrill: I don't think that counsel should coach the witness.

Mr. Jones: She doesn't need any coaching.

A. He wrote these G 33 and 39 and signed the two that I wrote G 28 and G 36.

Q. Do you know whether he ever left home after he had the first stroke?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled. [176]

A. Yes sir, he went to Seattle, Washington, twice and on short trips. We took a vacation through the Yellowstone Park. He did all the driving then.

Q. Were you accompanying him?

A. Yes sir.

Mr. Jones: You may take the witness.

Cross Examination

By Mr. Merrill:

Q. Your mother was Marie.

A. Segrid Marie.

Q. She wrote a number of those checks?

A. Yes sir.

Mr. Merrill: That is all.

Mr. Jones: That's all.

WILLIAM FLEMMING

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. State your name please?

A. William Flemming.

Q. Where do you live. in what town?

A. Pocatello.

Q. How long have you lived here?

A. Twenty-six years. [177]

Q. Who was your father?

A. Bazil Flemming.

Q. Where is he? A. Deceased.

Q. When did he die? A. December 1940.

Q. Do you know whether he was financial secretary of the defendant Company.

Mr. Merrill: Object to that form of question——

Mr. Jones: —Withdraw it.

Q. Do you know if he had anything to do with the business of the Omaha Woodmen Life Insurance Society?

Mr. Merrill: Objected to as calling for a conclusion of the witness, and he is incompetent to answer such a question.

The Court: That is pretty general. The objection is sustained.

(Testimony of William Flemming.)

Q. Is he the Bazil Flemming referred to in this case? A. Yes sir.

Q. Do you know anything about the work he did as financial secretary?

Mr. Merrill: Objected to as immaterial and incompetent, and not the best evidence, also it calls for a conclusion of the witness.

The Court: Overruled, if he knows.

Mr. Merrill: The last part of the question, [178] where reference is made to financial secretary, that calls for a conclusion of the witness.

The Court: Unless he knows that he was the financial secretary.

Q. Do you know that he was?

A. Yes sir.

Q. Where were living at the time your father died, and before your father died, what place in Pocatello? A. At his home, before he died.

Q. Up until when.

A. Until the last of July 1940.

Q. Was that about the time that Mr. Krussman died, if you know? A. Yes sir.

Q. Did you do any of the work in connection with the collections for your father as financial secretary?

Mr. Merrill: Objected to as being immaterial for any purpose.

The Court: Overruled.

(Testimony of William Flemming.)

A. Yes, I would make the collections when Father was busy at his job.

Q. Did you ever make any collection from Mr. Krussman mentioned in this case?

Mr. Merrill: Objected to as wholly immaterial and incompetent for any purpose.

The Court: Overruled. [179]

A. Yes sir.

Q. State to the Court what you did?

Mr. Merrill: The same objection. This man was not the financial secretary.

The Court: He says he was assisting his father in making the collections.

Mr. Merrill: There could not be any connection.

Q. Did you assist your father in connection with the policy that is sued on in this action?

Mr. Merrill: We make the same objection.

The Court: Overruled. Did you make any collections?

A. Yes sir.

Q. State what you did.

Mr. Merrill: The same objection.

The Court: The same ruling.

A. I would go around to the members and collect their insurance.

Mr. Merrill: We object now as being immaterial for any purpose. It is incompetent, and it is not responsive.

(Testimony of William Flemming.)

Q. You can limit it to Mr. Krussman.

The Court: Overruled.

A. Collections were made about the 15th of the month.

Mr. Merrill: I move to strike that as not responsive. [180]

The Court: Just answer the question.

A. I made collection at the Krussman home.

Q. How were they paid?

A. By check.

Q. What did you do with the check?

A. My father usually made a report, and I would put the check in an envelope and mail them.

Q. You say that your father made the reports.

A. Yes sir.

Q. And you saw him making these reports?

Mr. Merrill: Objected to as leading.

The Court: Objection sustained.

Q. Did you see your father do anything in regard to making reports?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. Yes sir.

Q. What did you see him do?

A. I saw him making up the reports and he would write receipts for me to give the members.

Q. Was any receipt written to you for Mr. Krussman? A. Never.

(Testimony of William Flemming.)

Q. How did you say the Krussman checks would be handled.

Mr. Merrill: Objected to as repetition and incompetent.

The Court: He may answer. [181]

A. They were put in the envelope with the report and mailed.

Q. Do you know what the general practice and custom of the members generally here in Pocatello was as to pay the assessments?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose. No foundation is laid for any such question and it has no bearing on this case.

The Court: Sustained.

Q. You may state if you know,—withdraw that,—state to the Court if you know, when the collections would be made each month and for what installment that would be collected?

Mr. Merrill: Objected to as repetition and upon the further ground that it is too general and not confined to the case at hand. He has previously testified and the checks will show the dates.

The Court: Do you confine it to this case?

Mr. Jones: Yes, to this case, Your Honor.

The Court: Overruled.

Q. The Krussman collection, I will confine it to that.

(Testimony of William Flemming.)

A. The collections were always made the month following the month in which the payments came due.

Q. What time in the month, generally, would the report for the previous month be sent in?

A. Around the 15th of the month. [182]

The Court: Sent where.

A. To the office at Omaha.

Q. That is the home office. A. Yes sir.

Q. That would be mailed out of here about when?

Mr. Merrill: Objected to as repetition.

The Court: Sustained, he said about the 15th of the month.

Q. You may state what the general practice and custom of your father was as you knew it in regard to the collection from the other members in Pocatello as to the time the collections were made and for what installments?

Mr. Merrill: Objected as incompetent, irrelevant and immaterial for any purpose and no foundation is laid, and also it calls for a conclusion of the witness.

The Court: I will reserve ruling on that. There is some question on this. If I find it is incompetent, I will strike his testimony on that.

A. There were several members that collections were made in the same manner as Mr. Krussman's

(Testimony of William Flemming.)

collections were made. That is, in the month following the month in which they were due.

Q. How many times would you say,—about how many times did you make these collections for your father?

Mr. Merrill: Objected as immaterial unless it [183] is confined to this case.

The Court: Do you confine it to this case?

Mr. Jones: Yes; first to this case.

The Court: Overruled.

A. Approximately every other month.

Q. For what period of time?

A. With Mr. Krussman it would be about 1935, since 1935.

Q. Every other month since that time.

A. Yes, the type of work my father was engaged in, some weeks on the 15th he would be working and the next month he would be off. If he was off he made the collections personally, and if he was working I would make the collection.

Q. Did you do any of the collection in 1940?

A. Yes sir.

Q. That is the year Mr. Krussman died?

A. No, that was in 1939,—I didn't make any in 1940.

Q. How long did the practice continue about making the collections as you indicate?

(Testimony of William Flemming.)

A. As far back as I can remember they were the same.

Mr. Merrill: You mean him making them sometimes and his father sometimes.

Q. You made them sometimes and your father sometimes.

A. That has been about ten years.

Q. Was that the general practice you followed at that time?

Mr. Merrill: Objected to as immaterial for any purpose, and leading. [184]

The Court: Sustained.

Q. You may state whether or not the collections were made during the time you helped him about in the manner you have indicated?

Mr. Merrill: Objected to as immaterial for any purpose whatever.

The Court: What collections are you talking about now.

Mr. Jones: From members in this locality.

Mr. Merrill: Objected to as immaterial for any purpose whatever.

The Court: I will reserve ruling.

A. Yes sir.

The Court: We will recess until 2 o'clock P.M.

(Testimony of William Flemming.)

October 23, 1941, 2 P. M.

Q. Mr. Flemming I call your attention to what has been marked as exhibit 19 and all the exhibits attached to that, and particularly to exhibit marked G 17 and ask you if you know whose hand writing is on the top of the check?

A. Yes, that is in the hand writing of Mr. Bazil Flemming.

Q. Your Father? A. Yes sir.

Q. What is that writing on that?

Mr. Merrill: Objected to as it speaks for itself. [185]

Mr. Jones: I call to the Court's attention the fact that this check being one admitted in evidence shows at the top of the check in the hand writing of Bazil Flemming "for number 11 report Nov. "

Mr. Merrill: Now I move that remark be stricken, he cannot tell what it is for. This witness says it is in his father's hand writing.

The Court: That is as far as he has gone yet.

Q. I call your attention to exhibit G 18, a check payable to Pacific Woodmen by Mr. Krussman or someone in his behalf, on which there is some hand writing at the top of the check "for number 12 installment" do you know whose hand writing that is?

Mr. Merrill: Objected to as immaterial.

The Court: If he knows, overruled.

(Testimony of William Flemming.)

A. That is my father's hand writing.

Q. Can you state how these installments were numbered each year?

Mr. Merrill: Objected to as incompetent. He was not the financial secretary.

The Court: Would not the record show how they were numbered.

Mr. Jones: They may but I see no harm in his stating if he knows.

The Court: If there is a record he would have to see the record and testify from that.

[186]

Q. On the first exhibit I showed you, being exhibit G 17 the portion of the top of the check reads for number 11 report November, that is the check dated December 12, 1937, and payable to the Pacific Woodmen? A. Yes sir.

Q. Do you know what number 11 report would be?

Mr. Merrill: Objected to as calling for a conclusion of the witness. Also there is no foundation.

The Court: Is the report in evidence?

Mr. Merrill: It would be a conclusion on his part at best.

The Court: Yes, the report is the best evidence.

Mr. Jones: We examined from these reports without objection.

(Testimony of William Flemming.)

Mr. Merrill: That was Mr. Pakes, and not this witness.

Q. I show you exhibit 15 being a letter as follows: Addressed Mr. Bazil Flemming, Pocatello, Idaho,——

Mr. Merrill: Objected to as this exhibit is in evidence and it speaks for itself.

The Court: Yes, it is in evidence, but the objection is overruled, he can examine as to the exhibit.

Q. Dear Sir, Referring to certificate T E 1321001, policy in the name of Eric A. Krussman, I wish at this time to change the beneficiary from Marion Alice Krussman to my [187] son, Harry E. Krussman. I will appreciate your attention to this immediately. I am herewith turning over to you my certificate T E 1321001 and would appreciate your attention to the matter at your earliest possible convenience. Sincerely yours, E. A. Krussman. Acknowledging certificate T E 1321001 for which I hereby receipt for receiving same. Bazil Flemming. It is understood that this change of beneficiary is now in effect. Bazil Flemming.” and there is a stamp “received August 8, 1940, Claim Department”

Do you recognize the signature of Bazil Flemming? A. I do.

Q. Whose signature is that?

A. My father's.

(Testimony of William Flemming.)

Q. Did you see that exhibit 15 in the possession of your Father?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. I did see this letter, Mr. Krussman came over and visited Father and talked to him about this matter. When Mr. Krussman left, my Father said to me——

Mr. Merrill: —Now we object to this as it would be hearsay.

The Court: Yes, he is about to testify as to what his father told him. Sustained. [188]

Q. Did you ever see it in the possession of your Father?

Mr. Merrill: Objected to as immaterial and repetition.

The Court: Sustained.

Q. When did you see it in possession of your Father?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. My father showed that letter at this conversation I was about to tell you, he showed me this letter then.

Q. When? A. After Mr. Krussman left.

Q. When was that?

A. That was just before he left on his vacation in July.

(Testimony of William Flemming.)

Q. What year? A. 1940.

Q. Were you ever in the presence of your Father when he made these monthly reports that were transmitted to the society?

A. Yes sir, I was there several times.

Mr. Jones: You may examine, that's all.

Cross Examination

By Mr. Merrill.

Q. Where are you living?

A. At present I am not living at home,—348 North 9th.

Q. Are you in Pocatello? A. Yes, sir.

[189]

Q. How old are you? A. Twenty-six.

Q. You have been collecting some of these premiums about ten years? A. Yes, sir.

Q. Prior to 1940? A. Yes, sir.

Q. So you would commence that when you were about fifteen? A. Yes, that's right.

Q. How many times between July 1938 and August 1940 did you collect at Mr. Krussman's home, at the Riverview Hotel, personally?

A. I didn't collect in 1940, I did in 1938 and 1939. I would say about twelve times in the two years.

Q. What is your occupation at the present time? A. Electrician.

Q. Are you connected with this Company in any way? A. No sir.

(Testimony of William Flemming.)

Q. Have you been since your father died?

A. No sir.

Q. How many people in Pocatello, or in the local camp number seven, carry insurance or had insurance during that time?

A. I am not sure as to the exact number.

Q. Approximately. A. Six or seven. [190]

Q. That carried insurance?

A. At the present time?

Q. No, during the period of time that you said that you would go and collect for your Father when he was financial secretary for the local camp. How many people in the local camp had insurance?

A. I can't say, but I can tell how many I collected from.

Q. Did you collect from delinquents or from everybody?

A. Those that didn't call to pay their dues.

Q. Do you have any idea how many had insurance at the local camp? A. Maybe twelve.

Q. All types of insurance? A. I can't say.

Q. You attempted to collect from those who hadn't paid?

A. No sir, that wasn't it.

Q. Those that were delinquent?

A. No that was not it, for the current report to be sent out.

Q. Then they were not all delinquent?

A. No sir.

(Testimony of William Flemming.)

Q. A few delinquents?

A. Maybe there would be some delinquents.

Q. You testified that there were some delinquents, can you tell how many? A. No sir.

[191]

Q. Not all delinquents that you collected from?

A. No sir.

Q. Occasionally you collected from a delinquent?

A. Yes sir.

Q. That is what you meant when you said that you collected delinquent installments?

A. I had no way of telling whether the installment was delinquent, sometimes a member paid for two months, that would usually be for one delinquent.

Q. When you collected from Mr. Krussman, you didn't know that they were delinquent?

A. They were not delinquent that I know of.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Jones.

Q. Calling your attention to the statement that you collected in a month for the installment due the month previously,—

Mr. Merrill: —Objected to as leading and not proper, he has been interrogated on direct examination on this very matter.

The Court: Overruled.

Q. What is the fact as to what you did?

(Testimony of William Flemming.)

A. I don't quite understand the question.

Q. You testified on direct examination this morning that you made collection in one month for what fell due the previous month. [192]

Mr. Merrill: Objected to as leading.

The Court: Sustained.

Q. What is the fact as to how you collected these installments?

A. As I understood it——

Mr. Merrill: —Objected to as repetition, he testified to all this on direct examination.

The Court: Overruled, go ahead.

A. The collections that were made, were made in the month following the month in which they were due. I think that is my testimony.

Q. Is that correct?

A. That is correct. I did not say it was for delinquent installments.

Q. In other words; if you collected in July, what installment would that be for?

A. For the installment in June.

Mr. Merrill: Objected to as leading.

The Court: The answer is in. Let it stand, the objection will be overruled.

Q. Counsel asked how many you collected. Do you remember some that you collected?

A. Yes sir, I remember some.

Mr. Merrill: We object to that as immaterial.

(Testimony of William Flemming.)

Mr. Jones: We will not press it. That's all. [193]

Recross Examination

By Mr. Merrill.

Q. When you collected a double assessment, for what months would you collect?

A. Sometimes they paid in advance and sometimes they pay for the month that they lapsed.

Q. Then they were delinquent and you knew that?

A. When they paid a double assessment or installment.

Q. When you collected an installment in July for June, you knew that it was a delinquent installment?

A. There would be two payments then.

Q. Would they always make them in two payments? A. Yes sir.

Q. You never collected an overdue installment in one installment? A. No.

Q. There never was a back payment, or a payment due for the month of June that you collected in July, except when you collected the July payment also?

A. No, that is not right.

Q. What do you mean when you say that it was when they made a double payment that you collected a delinquent installment?

(Testimony of William Flemming.)

A. If it was in July, I would make collection for the months of May and June.

Q. For two months delinquent? [194]

A. No, one month behind.

Q. Is it your understanding that if payment was due in June and that you collected it in July, it was on time? A. It was.

Q. That is the basis of your testimony?

A. That is my understanding.

Q. That is the basis of your testimony?

A. Yes sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Jones.

Q. I show you what has been marked as exhibit I being the financial Secretary's monthly report that has been introduced in evidence. You will note this on the report "I hereby certify that this is a correct report of the members of this camp as shown by its records, made this 17th day of December 1938" I will ask you to state, if you know, when the collections would be made for that report?

Mr. Merrill: Objected to as calling for a conclusion of the witness, and it is not proper redirect examination, it is incompetent, irrelevant and immaterial for any purpose.

The Court: Overruled.

A. This is the November report and it was made in December. [195]

(Testimony of William Flemming.)

Q. When would the collection be made for that report?

Mr. Merrill: Objected to as calling for a conclusion. He testified that he made some of the collections and his Father made some.

The Court: Do you know, yourself, when these collections were made. When that was done.

A. I cannot tell that identical report.

Q. With reference to the reports that you knew about, when they were made for the month of July, that would be for what month's collections?

Mr. Merrill: Objected to as not intelligible and there is nothing identified by the question.

The Court: Sustained.

Q. If I understand you correctly,—I will ask you, when you collected an installment in July, it would be for what month?

Mr. Merrill: Objected to as repetition.

The Court: Sustained.

HARRY E. KRUSSMAN,

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones.

Q. State your name?

A. Harry Eric Krussman. [196]

Q. Are you the plaintiff in this action?

A. Yes sir.

Q. I show you plaintiff's exhibit 16 and I will ask you to state, if you know, if the signature at the bottom of the second letter of that exhibit,—if you know whose signature that is?

A. That is my signature.

Q. You know what you did with that letter after you signed it, do you?

A. Yes, I signed it on June 25, 1940 and immediately mailed it to my father in Pocatello, Idaho.

Mr. Jones: That's all.

Cross Examination

By Mr. Merrill:

Q. What date was that?

A. June 25, 1940.

Q. Where were you living during this period?

A. Twin Falls, Idaho.

Q. You came home frequently?

A. Yes, I had been.

(Testimony of Harry Eric Krussman.)

Q. I would like to have you look at exhibit 8 and I will ask you if that bears your signature?

A. On the reverse side, yes sir.

Q. Yes, to be sure. This is one sheet of paper written on both sides?

A. Yes, that is my signature. [197]

Q. Is the writing your writing?

A. The only writing is the signing and the last paragraph where it says Harry E. Krussman age 33, son. Twin Falls, Idaho.

Q. Do you know what was done with it after you signed it?

A. Handed it to Basil Flemming.

Q. For the purpose of establishing proof of loss in this case.

A. Yes, I think it was.

Mr. Merrill: That's all.

Mr. Jones: That's all, and we would like to recall Mr. Flemming for a question.

WILLIAM FLEMMING

Being recalled, as a witness on behalf of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Flemming, you testified that you make some collections of some checks from Mr. Kruss-

(Testimony of Harry Eric Krussman.)

man, now where in the Krussman apartment or the Riverview Hotel apartment were those checks handed to you? A. In the lobby.

Q. Who was present, if anyone?

A. Mr. Krussman.

Q. Either of his daughters there when they were handed to you? [198] A. No sir.

Mr. Jones: That's all.

Mr. Merrill: No cross examination.

Mr. Jones: We rest.

DR. F. M. RAY

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name? A. Fred M. Ray.

Q. What is your profession?

A. Physician and surgeon.

Q. Where are you living?

A. Pocatello, Idaho.

Q. How long have you been engaged in the profession of physician and surgeon?

A. Since 1909.

Mr. Jones: We will admit his qualifications.

Mr. Merrill: Thank you.

(Testimony of Dr. F. M. Ray.)

Q. Did you know one Eric A. Krussman, Doctor?
A. Yes sir.

Q. When did you first become acquainted with him, approximately?
A. In 1911. [199]

Q. Was that acquaintance intimate?

A. We became rather close acquaintances.

Q. Were you his family physician?

A. I think I was.

Q. Did you attend him as his physician?

A. Yes sir.

Q. I am directing your attention to the month of July 1938, and will ask you, did you attend him then?
A. Yes, I did.

Q. When were you first called?

A. According to my information, I think it was on July 22.

Q. Explain what you mean by according to your information, is that from your records?

A. In looking over my records, that is my remembrance.

Q. July 22, 1938?
A. Yes sir.

Q. To what place did you go?

A. At the Riverview hotel.

Q. Here in Pocatello?
A. Yes sir.

Q. What condition did you find him in?

A. Well, I found him in an unconscious state with paralysis of the right side.

Q. Did you give him an examination at that time?
A. Yes sir.

(Testimony of Dr. F. M. Ray.)

Q. Were you able to determine the reason for his condition? [200]

A. I thought at that time that he had a cerebral hemorrhage.

Q. Did you determine that was a fact later?

A. Yes sir.

Q. Was he in the house or out doors?

A. In the living room.

Q. What did you do?

A. Put him in his bed, in the Riverview Hotel.

Q. Did you prescribe for him?

A. I don't know that I did right then.

Q. Did you call again that day?

A. That was at night. I was there several times during the next morning and next day.

Q. What was his situation the next day?

A. As I recall he was unconscious for several days.

Q. Did he have what is called a stroke?

A. Commonly called a stroke, yes.

Q. What is a cerebral hemorrhage?

A. Breaking of a blood vessel in the brain.

Q. What part of the body did it affect with Mr. Krussman?

A. The arm and leg on the right side.

Q. Any other part of the body?

A. Yes, the left side of the face.

Q. What did it do with respect to the mind?

A. He was unconscious, he wasn't responsible mentally at that time.

(Testimony of Dr. F. M. Ray.)

Q. How long did he remain in that condition?

[201]

A. Off-hand I would say perhaps two weeks.

Q. Did you call on him on July 23rd?

A. Yes sir.

Q. How many calls did you make that day?

A. I saw him several times, I judge three times a day most of the days for a week.

Q. July 24? A. Yes sir.

Q. July the 25th, how many times?

A. I judge three times a day for a week or more at that time.

Q. How long did you keep calling on him?

A. I saw him most every day if I were in town during the rest of July and August.

Q. How many times during each day of July and August?

A. I think the last part I made the least number of calls, that is, in the latter part of August.

Q. During that entire time he was suffering from the cerebral hemorrhage? A. Yes sir.

Q. A paralytic stroke? A. Yes sir.

Q. How long did he remain in bed?

A. I don't just recall how long he was. He was not able to get up at all for several weeks.

Q. Thereafter was he in a wheel chair?

A. I don't recall a wheel chair. [202]

Q. What was the result of the condition of his right side?

A. Well, after a certain length of time I think

(Testimony of Dr. F. M. Ray.)

perhaps ten or twelve days he regained a portion of his mental normalcy. I don't recall just how long it was before he got the use of his arm and leg.

Q. Isn't it a fact that his arm and leg were afflicted constantly thereafter?

A. They never got back to normal.

Q. What was the ultimate result upon his right side Doctor Ray?

A. I think aside from the fact that he couldn't make the finer movements that he was able to get around.

Q. Was his leg constantly impaired?

A. Yes sir.

Q. And his arm, was it constantly impaired?

A. Yes sir.

Q. That continued up to the date of his death?

A. Yes sir.

Q. Did he sustain a second stroke?

A. Yes sir.

Q. When?

A. I don't remember whether it was in August or September two years later.

Q. Was it on the 23rd day of July 1940?

A. It may have been in July. [203]

Q. Do you recall calling on him then?

A. Yes.

Q. What was his condition?

A. He had another stroke which perhaps didn't put him out as thoroughly as the first one, but he was pretty much unconscious from that time.

(Testimony of Dr. F. M. Ray.)

Q. Until he died? A. Yes sir.

Q. When did he die?

A. It must have been the first part of August if that stroke was in July.

Q. Was there any difference aside from severity between the two strokes?

A. I don't think he responded as much to treatment after the second stroke.

Q. What have you to say as to the same conditions of the body produced by the first and the second strokes? A. Yes sir.

Q. The same condition as existed on the first stroke was produced by the second stroke.

A. Probably the same cause.

Q. Did he regain consciousness the second time?

A. I don't recall that he was ever clear. I think there were times when he seemed to know who I was. I don't recall his having talked to me rationally after the second stroke. [204]

Q. Do you know how long it was after the second stroke to the time of his death?

A. I wouldn't know off-hand but I would say eight or ten, or twelve days.

Q. I am handing you plaintiff's exhibit for the purpose of refreshing your memory as to the date of his death.

Mr. Jones: No dispute on that. It was the second day of August.

Q. Do you recall making it out?

(Testimony of Dr. F. M. Ray.)

A. This copy.

Q. Do you recall making the original?

A. Yes sir.

Q. Is the fact as to the date of death correct?

A. August 2, I would say yes.

Q. From that as a basis, now Doctor, when did he take the second stroke?

A. If I saw him July 23, that would be ten days.

Q. What is the fact as to whether or not you saw him then?

A. I suppose I saw him every day.

Q. Did he have the second stroke in July?

A. From this certificate I would say yes.

Q. From your recollection, Doctor.

A. By refreshing my recollection I would say yes.

Q. I call your attention to the answer to question number 21, "I hereby certify that I attended deceased From August 1938, to August 2, 1940", is that correct? [205]

A. I had seen him as a patient previously.

Q. What I mean to say is this; was it in August or earlier that he took the first stroke?

A. As I recall, August.

Q. Isn't it true that you began attending him on the 22nd of July for this stroke?

A. If that is the date he took sick, it is.

Q. Have you looked at your record on this?

A. I have, but maybe I have something in my pocket to assist me.

(Testimony of Dr. F. M. Ray.)

Q. Is that instrument you are looking at, your memorandum of this matter?

A. It is on account on the books.

Q. From that can you tell when you first commenced to attend him for this stroke?

A. The first record I have is August 28th.

Q. What year?

A. 1938, which would not be right,—no I have it here, July 23.

Q. 1938. A. Yes sir.

Q. Do you have there a paper—

A. —No, I am sorry this is 1940, I have nothing in my pocket back of August 28, 1938.

Q. You have a statement of your visits in your office, as to the visits in 1938. [206]

A. Yes sir.

Q. Can you produce it?

Mr. Jones: I think we will agree to that. We will agree that it was the 22nd or the 20th day of July.

The Court: Very well, if you agree.

Mr. Jones: We will agree that it was the 20th of July 1938.

Q. You were called immediately.

A. Yes sir.

Q. You commenced treating him the 20th of July?

A. Yes sir, if that is the time, the date of the stroke.

Q. Your visits were continued for several weeks.

A. Yes sir, all the rest of July and August and

(Testimony of Dr. F. M. Ray.)

then I seem to have seen him most every day in September.

Q. What about the time following that?

A. I saw him in October five times.

Q. In November?

A. I haven't anything in November.

Q. Was he suffering from any pre-disposing causes, any other ailment?

A. Other than that which caused his stroke.

Q. Doctor, what about his blood pressure?

A. I think he had high blood pressure.

Q. Would that be a pre-disposing cause of the stroke? A. Could be, yes sir. [207]

Q. I hand you exhibit 7 and I will ask you if it bears your signature?

A. Yes sir, proof of death, it bears my signature.

Q. Are the questions answered in your handwriting? A. Yes sir.

Q. I call your attention to the answer to question number 4, "when did deceased show the first symptoms of his final illness?" and the answer "August 1938". In view of the understanding that the stroke commenced July 20, 1938, is that statement correct?

A. So far as the final illness, it would be July.

Q. Instead of August? A. Yes sir.

Q. Otherwise it is correct? A. Yes sir.

Q. Also in question 11, "what was the remote cause of death, if from disease, give pre-disposing

cause, date of first appearance of its symptoms and history of same." The answer given "cerebral hemorrhage two years ago, August 1938." Should that be July 1938? A. Yes sir.

Mr. Merrill: You may take the witness.

Mr. Jones: No cross examination.

Mr. Merrill: We offer in evidence defendant's exhibit 20, a certified copy of the death certificate of Mr. Krussman, certified to by the Department of Vital [208] statistics of the State of Idaho.

Mr. Jones: Is it for the purpose of proving his death.

Mr. Merrill: For the purpose of all it contains.

Mr. Jones: No objection.

The Court: Admitted.

Mr. Merrill: Now we ask that this instrument be marked as defendant's exhibit 21.

We have a stipulation, Mr. Jones, that we will make on this matter. That defendant's exhibit "21" which we offer in evidence at this time is a check for the refund to the plaintiff Harry E. Krussman, for all assessments paid by or for Mr. Eric Krussman subsequent to his suspension of July 1, 1938, less the distribution of savings and gains paid to him. The check represents all payments made by Mr. Krussman on account of certificate T E 1321001 for the month of May 1938 less the distribution aforementioned, and of savings and gains in the sum of \$10.55 which was paid February 25, 1939 and February 1, 1940. We would like to stipulate

that the tender has been made to you on behalf of the plaintiff of said sum of money for said purpose and rejected.

Mr. Jones: We want to strike out the word suspension. We don't construe that he was suspended. I don't want to admit that it was a suspension. Strike out the word suspension. [209]

Mr. Merrill: Very well. Will you also stipulate that the tender was rejected.

Mr. Jones: Yes.

Mr. Merrill: That the tender in the form of check is satisfactory, rather than cash.

Mr. Jones: We will stipulate that we refused it and would have refused the cash.

Mr. Merrill: And that the tender of this check for \$294.80 covers and includes the amount mentioned in exhibit 13, check for \$153.25. That this check exhibit 21 was made as a tender for all installments subsequent to July,—subsequent to May 1938.

Mr. Jones: Less the distribution of savings and gains in the sum of \$10.55 each paid February 25, 1939 and February 1, 1940, and that we rejected the tender.

The Court: Admitted.

Mr. Merrill: And may it be understood that the tender is kept good in the form of the check rather than cash. Our position is that they are entitled to the return of the amount of that check.

Mr. Jones: That you made the tender and we rejected it, not if you are keeping that tender

good, it is for you to say and that is all there is to it.

Mr. Merrill: Very well, we are.

Mr. Jones: And we are still rejecting it. [210]

Mr. Merrill: I offer to amend by interlineation the answer to conform to the proof on page 3 of the answer in line three of the second paragraph by deleting the words August 24, 1939 and inserting the words "July 19, 1938."

Mr. Jones: No objection.

The Court: Amendment allowed.

Mr. Merrill: Now we rest.

Mr. Jones: No rebuttal. [211]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the Reporter for the United States District Court, for the District of Idaho; that I reported the testimony and proceedings in the above entitled cause in shorthand and thereafter transcribed the same into longhand and that the foregoing transcript consisting of 134 pages exclusive of this certificate is a true and correct transcript of all the testimony given and proceedings had in and about the trial of the said cause.

In Witness Whereof I have hereunto set my hand this 23rd day of January 1942.

G. C. VAUGHAN

Reporter

[Endorsed]: Filed Feb. 9, 1942. [212]

[Title of District Court and Cause.]

MOTION AS TO EXHIBITS

Comes now the defendant and appellant, Omaha Woodmen Life Insurance Society, a corporation, and moves the Court for an Order directing the Clerk of this Court to forward to the United States Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced in this cause, in lieu of copies thereof, for use of said Appellate Court on appeal, which exhibits are more particularly described as follows:

Plaintiff's Exhibits:

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, "A", "B", "C", "D", "E", "F", "F-1", "G", "H", "I", "J", "K", and 19, including Exhibits G-1 to G-49 inclusive, attached to said Exhibit 19.

Defendants Exhibits

Nos. 12, 13, 18, 20 and 21.

The foregoing being all of the exhibits in the above entitled cause.

Dated this 2nd day of February, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant
and Appellant,

Residing at Pocatello, Idaho.

RAINEY T. WELLS

Attorney for Defendant
and Appellant,

Residing at Omaha, Nebraska.

[Endorsed]: Filed Feb. 9, 1942. [255]

[Title of District Court and Cause.]

ORDER AS TO EXHIBITS

It appearing to the Court that the defendant herein, Omaha Woodmen Life Insurance Society, a corporation, has appealed to the United States Circuit Court of Appeals, Ninth Circuit, and has moved that an order issue directing that certain original exhibits be forwarded to the Appellate Court in lieu of copies thereof;

Now therefore it is hereby ordered that all of the exhibits introduced at the trial of this cause be forwarded by the clerk of this court to the Clerk of the Circuit Court of Appeals, Ninth Circuit, to be by such court held for inspection and used on the appeal so taken by said appellant; and

It is further ordered that upon the completion and use thereof by the Appellate Court that the same be returned to this court for further order by this court.

Dated this 9th day of February, 1942.

CHARLES C. CAVANAH

United States District Judge

[Endorsed]: Filed Feb. 9, 1942. [256]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF OCTOBER 22, 1941

This cause came regularly on for trial before the Court. Messrs. Jones and Jones appeared as coun-

sel for the plaintiff and Messrs. Merrill and Merrill appeared as counsel for the defendant.

After a statement of the plaintiff's case by his counsel and a statement of the defense by the defendant's counsel, the deposition of V. J. Pakes was read and documentary evidence was introduced on the part of the plaintiff.

Further trial of the cause was continued to ten o'clock A. M. on October 23, 1941. [257]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 23, 1941

Counsel for the respective parties being present, the trial of this cause was resumed before the Court. The reading of the deposition of V. J. Pakes was resumed and completed, and Mrs. Beatrice Ginzell, Marian Alice Krussman, William Fleming and Harry E. Krussman were sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff, and here the plaintiff rests.

Dr. F. M. Ray was sworn and examined as a witness and documentary evidence was introduced on the part of the defendant, and here the defendant rests and both sides close.

The defendant was granted leave to amend the answer to conform to the proof by striking 'August 24, 1939' and inserting in lieu thereof, "July 19, 1938", and striking "July, 1939" and inserting in

lieu thereof "June, 1938", all in line three of the second paragraph on page three.

After hearing oral argument of counsel for the respective parties, the Court granted the plaintiff ten days in which to file brief and the defendant the fifteen days following. Plaintiff was granted five days in which to file answering brief. [258]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now the Appellant, Omaha Woodmen Life Insurance Society, and hereby designates the contents of the Record, Proceedings and Evidence to be contained in the Record on Appeal of the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Complaint.
2. Order on Removal of Cause to United States District Court for the District of Idaho, Eastern Division.
3. Order Enlarging Time to Plead, dated March 31, 1941.
4. Answer.
5. Motion to Amend Answer by Interlineation.
6. Minute Entry Allowing Amendment.
7. Written Opinion of the Court, dated December 5, 1941.

8. Findings of Fact and Conclusions of Law.

9. Judgment.

10. Objections to Findings, Conclusions of Law and Judgment, and Motion to Strike, Amend and Substitute, together with Ruling of the Court thereon.

11. Notice of Appeal.

12. Cost Bond on Appeal. [259]

13. Petition for Approval of Supersedeas and Stay on Appeal.

14. Order Approving Bond and Granting Stay of Execution.

15. Supersedeas Bond.

16. All testimony taken at the trial, the same being contained in the Reporter's Transcript, two copies of which are herewith filed with the Clerk of this Court.

17. The exhibits to be printed in the record, to-wit:

Plaintiff's Exhibits numbered 1, 2, those portions of Plaintiff's Exhibit numbered 3, designated as:

Section 63 (a) and (b) on Page 55,

Section 65 on Pages 55 and 56,

Sections 66 (a) and (b) on Page 56,

Sections 82 (a) and (b) on Page 61,

Section 105 (a) and (b) on Pages 70 and 71.

Section 109 (g) on Page 73,

Section 111 on Page 73.

Also those portions of Plaintiff's Exhibit numbered 4, designated as:

Section 63 (a) and (b) on Page 55,
Section 65 on Pages 55 and 56,
Sections 66 (a) and (b) on Page 56,
Sections 82 (a) and (b) on Page 64,
Section 109 (g) on Page 75.

Also those portions of Plaintiff's Exhibit numbered 5, designated as:

Section 63 (a) and (b) on Page 56,
Section 65 on Pages 56 and 57,
Section 66 (a) and (b) on Page 57,
Section 72 (a) and (b) on Pages 58 and 59,
Section 82 (a) and (b) on Pages 65 and 66,
Section 107 (a) on Page 76,
Sections 107 (g) and (h) on Page 77,

Also Plaintiff's Exhibits numbered 6, 7, 8, 9, 14, 15, 16, 17, "A", "B", "C", "E", "F-1", "J", "K".

Also Plaintiff's Exhibit numbered 19, being a Stipulation, except the Exhibits numbered "G-1" to "G-49" attached thereto, which are to be forwarded in original form to the Appellate Court.

Also Defendant's Exhibits numbered 10, 11 and 18.

18. Motion as to Exhibits.
19. Order as to Exhibits.
20. All Court Minutes.

21. Two Copies of Reporter's Transcript.
22. Designation of Contents of Record on Appeal and Proof of Service.
23. Statement of Points and Proof of Service.

Dated this second day of February, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant
and Appellant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant
and Appellant

Residing at Omaha, Nebraska

[260]

Service of the foregoing Designation of Contents of Record on Appeal by receipt of copy thereof admitted to have been made this 2nd day of February, 1942.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff
and Appellee

Residing at Pocatello, Idaho

[Endorsed]: Filed Feb. 9, 1942. [261]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the Defendant-Appellant, Omaha Woodmen Life Insurance Society, and makes the

following Statement of the Points upon which it intends to rely in the appeal taken to the Circuit Court of Appeals of the Ninth District in the above entitled cause:

I.

That the Omaha Woodmen Life Insurance Society is a fraternal benefit society and insures the lives of some of its members as part of its fraternal functions. That the contract between Eric A. Krussman, deceased, and the Omaha Woodmen Life Insurance Society consists of the Member's Application, the Certificate Issued, the Articles of Incorporation and all of the provisions of the Constitution, Laws and By-Laws of the Association, and all amendments thereto. The provisions of said contract are binding upon his beneficiaries and the Society and the member is conclusively presumed to know the terms of the entire contract and the nature and effect of each of the provisions contained therein.

II.

The contract in the case at bar contained provisions to the effect that the member must pay his dues monthly for the [262] month in which they became payable and if he failed to do so the contract was automatically terminated and he was suspended; that thereafter, and within three months from the date of suspension he could pay the delinquent assessments and again become a member, provided he was in good health and remained in good health for thirty days. The Society was re-

quired to accept the payment of delinquent assessments within said period of time but the same came with a warranty on the part of the member that he was in good health, which warranty, if false, rendered ineffective the attempt of the member to again become reinstated and left the certificate of insurance void. Eric A. Krussman, the member in the Certificate sued on in the case at bar, failed to make his monthly payments within the month for which they became due from June, 1938, until his death, and during all of said time he was not in good health and consequently he never thereafter became reinstated as a member, nor his Certificate rendered effective, but upon his death on August 2, 1940, the Certificate was void and of no force or effect and his beneficiaries were not entitled to recover thereunder.

III.

That under the evidence introduced in this case, the Beneficiary Certificate upon which suit was instituted was void because the member had not conformed to the terms of the contract in the payment of his installments; that the Certificate became void and was never reinstated after commencement of Mr. Krussman's illness, and the trial Court erred in rendering Judgment against the defendant.

IV.

That there was no waiver on the part of the Omaha Woodmen Life Insurance Society of any of the provisions of the Contract and particularly the

requirement of timely payments and the warranty of good health, and the trial Court erred in finding and concluding that the provisions making such requirements had been waived. [263]

V.

That the evidence introduced is wholly insufficient to prove a waiver by the defendant of any of the terms of the contract of insurance.

VI.

That neither the financial secretary or his agent had any power to waive any of the provisions of the contract including the provisions of the Constitution, Laws and By-Laws of the Society and any knowledge which he, or his agent may have had, if any, as to the ill health of Eric A. Krussman when collection was made of any delinquent payment, or at any other time, was immaterial so far as the issues of this case are concerned and was not and could not have constituted evidence that the said financial secretary had communicated such information to the defendant, and the defendant was not charged with any such information.

VII.

Eric A. Krussman was not in good health from on or about July 22, 1938, until he died on August 2, 1940, and the warranty of good health accompanying the payments tendered after July 22, 1938 was false and the falsity thereof was unknown to the defendant; that the receipt of such payments

by the appellant and the delivery to the member of refund of \$10.55 per year, and the form letters sent by Mr. Bradshaw were all without knowledge on the part of Mr. Bradshaw or any officer of the Society, that Mr. Krussman was not in good health, and consequently that which was done by Mr. Bradshaw or the appellant in such respects could not effect its legal rights, nor constitute a waiver or in anywise change the terms of the contract.

VIII.

The member holding a Certificate of Insurance is conclusively charged as a matter of law with knowledge of the [264] provisions of his Contract and that if he does not pay the assessments as agreed his Certificate becomes void and any payment thereafter made is for the reinstatement pursuant to the terms of the contract and not otherwise.

IX.

Generally, the contract sued upon in this case was forfeited for violation of its terms by Eric A. Krussman, and never thereafter became reinstated, and was void on the date of the death of the said Eric A. Krussman; that there was no waiver of any contractual provision by defendant, and the defendant, under the evidence introduced herein, was not liable under said contract to the plaintiff on any theory. The trial Court should not have made and entered Findings of Fact and Conclusions of Law and Judgment contrary to the defendant,

but should have sustained the Objections to the Findings, the Motion to Strike and should have made substitute Findings and Conclusions as requested by the defendant and entered judgment in favor of defendant.

Dated this 2nd day of February, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant
and Appellant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant
and Appellant

Residing at Omaha, Nebraska

Service of the foregoing statement of Points on Appeal by receipt of copies thereof admitted to have been made this 2nd day of February, 1942.

T. D. JONES

RALPH H. JONES

[Endorsed]: Filed Feb. 9, 1942. [265]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It is stipulated by and between the above parties, through their attorneys of record that in order to avoid printing parts of exhibits deemed unnecessary and difficult to print the appellant's Designation of

the Contents of Record, wherein certain exhibits are required to be printed, may be modified as follows, to-wit:

That only that portion of Plaintiff's Exhibit 1 need be printed, as follows:

[Printer's note]: Set forth at pages 104, 105 of this printed transcript of record. [266]

That only that portion of Plaintiff's Exhibit 7 need be printed, as follows:

[Printer's Note]: Set forth at pages 130, 131 of this printed transcript of record.

That only that portion of Plaintiff's Exhibit 8 need be printed, as follows: [267]

[Printer's Note]: Set forth at pages 131, 132 of this printed transcript of record.

That only that portion of Plaintiff's Exhibit 9 need be printed, as follows:

[Printer's Note]: Set forth at page 132 of this printed transcript of record.

It is further stipulated that it is impractical to print Defendant's Exhibit 18.

It is further stipulated that the remaining portions of the above numbered Exhibits and also Plaintiff's Exhibits Numbered 3, 4 and 5 not otherwise required to be printed and Plaintiff's Exhibits numbered 12, 13, "D", "F", "G", "H", "I" and Exhibits G-1 to G-49 inclusive attached to Plaintiff's Exhibit Number 19, and Defendant's Exhibits numbered 18, 20 and 21, are deemed to be impractical and unnecessary to print in the record, but would [268] best serve the Appellate Court by being

transmitted in original form and that said parties pray for an Order dispensing with the printing of same.

Dated this 26th day of February, 1942.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff

Residence and P. O. Address
Pocatello, Idaho

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant.

Residence and P. O. Address
Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant

Residence and P. O. Address
Omaha, Nebraska

[Endorsed]: Filed Feb. 28, 1942. [269]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD**

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages

numbered 1 to 269, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$33.50, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 2nd day of March, 1942.

[Seal] W. D. McREYNOLDS,
Clerk.

[Endorsed]: No. 10077. United States Circuit Court of Appeals for the Ninth Circuit. Omaha Woodmen Life Insurance Society, a corporation, Appellant, vs. Harry E. Krussman, as trustee of an express trust, Appellee. Transcript of Record.

Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed March 5, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10077

OMAHA WOODMEN LIFE INSURANCE
SOCIETY, a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN, Trustee of an Express
Trust,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF

Comes now the appellant and hereby adopts as its Statement of Points upon which it intends to rely on appeal, the Statement of Points heretofore filed with the Clerk of the District Court of the United States District of Idaho, from which Court

this appeal is taken, such Statement of Points being that appearing in the Transcript certified to this Court by said Clerk of the United States District Court for the District of Idaho.

The appellant hereby designates for printing, as the parts of record necessary for the consideration of said points, the entire transcript as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, including those exhibits and excerpts from exhibits which are enumerated in Paragraph numbered 17 of the Designation of Contents of Record on Appeal, and as modified by Stipulation between the parties dated the 26th day of February, 1942, and filed with the Clerk of the United States District Court for the District of Idaho; expressly specifying however, that the exhibits and remaining parts of exhibits not therein requested to be printed be not printed but appellant prays that the same be considered by this Court in their original form.

A. L. MERRILL

R. D. MERRILL

Residence and Postoffice

Address: Pocatello, Idaho

RAINEY T. WELLS

Residence and Postoffice

Address: Omaha, Nebraska

Attorneys for Appellant

Service of the foregoing Statement admitted to have been made this 12th day of March, 1942.

T. D. JONES

RALPH H. JONES

Residence and Postoffice

Address: Pocatello, Idaho

Attorneys for Appellee

[Endorsed]: Filed Mar. 14, 1942.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States
Circuit Court of Appeals, Ninth Circuit:

The Petition of the Omaha Woodmen Life Insurance Society, a corporation, respectfully shows:

That an Appeal has been perfected by your petitioner to this Court from a Judgment rendered in the United States District Court for the District of Idaho in a suit wherein Harry E. Krussman, Trustee of an Express Trust, was plaintiff, and Omaha Woodmen Life Insurance Society, a corporation, was defendant.

There was introduced in evidence at the trial of the cause by the respective parties the following exhibits, to-wit:

Plaintiff's Exhibits numbered 1 to 9 inclusive,
Plaintiff's Exhibits numbered 12 to 17 inclusive;

Plaintiff's Exhibit No. 19; Plaintiff's Exhibits "A", "B", "C", "D", "E", "F", "F-1", "G", "H", "I", "J", and "K"; also Defendant's Exhibits numbered 10, 11, 18, 20 and 21. That Plaintiff's Exhibits numbered 2, 6, 14, 15, 16, 17, "A", "B", "C", "E", "F-1", "J", "K", and Defendant's Exhibits numbered 10 and 11 will be printed in full in the record and pertinent excerpts will be printed from Plaintiff's Exhibits numbered 1, 3, 4, 5, 7, 8, and 9 and all of Plaintiff's Exhibit 19 might be printed except those exhibits attached thereto and marked Exhibits "G-1" to "G-49" inclusive, being cancelled checks.

That the exhibits which appellant believes would be impractical and difficult to print and for which no application to print has been made are Plaintiff's Exhibits 12 and 13, "D", "F", "G", "H", and Plaintiff's Exhibits "G-1" to "G-49", being bank checks, and Defendant's Exhibit 18, being a record card, and Defendant's Exhibit 20, being a photostatic copy of a Death Certificate, and Defendant's Exhibit No. 21, being a bank check. That Plaintiff's Exhibit No. 1 is an Application for Membership in the defendant society, Plaintiff's Exhibits numbered 3, 4 and 5 are pamphlets containing the Constitution, Laws and By-Laws of the Appellant and Plaintiff's Exhibits numbered 7, 8 and 9 are proofs of death of Eric A. Krussman, and it is thought that only pertinent parts of said exhibits heretofore designated should be printed, but that all of the remaining parts of said exhibits

and those not printed should be available for consideration by this Court in the original form.

All of the said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the Ninth Circuit Court of Appeals. There is attached hereto an affidavit of A. L. Merrill which is made part hereof.

Wherefore your petitioner prays for an Order dispensing with the printing of Plaintiff's Exhibits numbered 12 and 13, "D", "F", "G", "H", and "G-1" to "G-49", and Defendant's Exhibits numbered 18, 20 and 21, and those parts of Plaintiff's Exhibits numbered 1, 3, 4, 5, 7, 8, and 9 not heretofore requested to be printed and that all of the said original exhibits be considered by this Court.

OMAHA WOODMEN LIFE

INSURANCE SOCIETY

By **A. L. MERRILL**

R. D. MERRILL

Residence and Post Office Address:
Pocatello, Idaho

RAINEY T. WELLS

Residence and Post Office Address:
Omaha, Nebraska

Attorneys for Appellant

So ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Mar. 14, 1942.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF A. L. MERRILL

State of Idaho,
County of Bannock—ss.

A. L. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the Omaha Woodmen Life Insurance Society, appellant herein, and makes this affidavit on behalf of said appellant for the purpose of securing an Order dispensing with the printing of certain exhibits and parts of certain other exhibits, all as stated in the Application for Order attached hereto.

That Judgment was rendered herein in favor of the plaintiff against the defendant on December 23, 1941; that on January 31, 1942 defendant perfected an Appeal to this Court by filing its Notice and Undertaking on Appeal and has since served and filed the additional papers required by the rules of this Court:

That on February 9, 1942, the Honorable Charles C. Cavanah, District Judge, made an order directing that all of the original exhibits be forwarded to this Court with the Record on Appeal.

That on February 26, 1942, the parties through their counsel of record stipulated that it was impractical and unnecessary to print certain exhibits referred to in the accompanying Application and that only excerpts from other exhibits referred to therein be printed, thus leaving for printing such

exhibits as did not offer difficulty in printing; that the exhibits which it is requested be not printed present difficulties in printing and would decidedly encumber the record as would more particularly appear from an examination of said exhibits and that such exhibits may probably serve the Appellate Court better in their original form.

A. L. MERRILL

Subscribed and sworn to before me this 12th day of March, 1942.

(Seal)

G. L. STOWELL,

Notary Public

Residing at Pocatello, Idaho

My Commission expires 3-21-43.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF OF APPELLANT

Upon appeal from the District Court of the United States
for the District of Idaho, Eastern Division

A. L. MERRILL

R. D. MERRILL

Residence and Postoffice Address:
Pocatello, Idaho.

RAINEY T. WELLS

Residence and Postoffice Address:
Omaha, Nebraska.

Attorneys for Appellant

FILED

APR 24 1942

PAUL C. O'BRIEN,

CLERK

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF OF APPELLANT

Upon appeal from the District Court of the United States
for the District of Idaho, Eastern Division

A. L. MERRILL

R. D. MERRILL

Residence and Postoffice Address:
Pocatello, Idaho.

RAINEY T. WELLS

Residence and Postoffice Address:
Omaha, Nebraska.

Attorneys for Appellant

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF OF APPELLANT

JURISDICTION

This suit was commenced in the District Court of the Fifth Judicial District of the State of Idaho in and for Bannock County, on February 5, 1941 (R-19) by filing complaint on the part of Harry E. Krussman, as Trustee of an Express Trust, a resident of the State of Idaho, against Omaha Woodmen Life Insurance Society, a corporation, incorporated under the laws of the State of Nebraska, to recover Five Thousand (\$5,000.00) Dollars and interest and costs (R-1-15). On March 10, 1941, an Order was made by the District Judge of the Fifth Judicial District of the State of Idaho for the removal of said cause to the United States District Court for the District of Idaho, Eastern Division (R 20-21). The jurisdiction of the District Court was based

upon Section 24 of the Judicial Code as amended, 28 U. S. C. A. Sec. 41. On May 1, 1941, an Answer was filed by the defendant (R 22-38) which was within the time prescribed by the Court (R 21-22). Said Answer was amended by Interlineation October 13, 1941 (R 38-41). Trial upon the issues commenced October 23, 1941, before the Honorable Charles C. Cavanah, sitting without a jury, and after evidence had been received the cause was taken under advisement and the Court rendered its opinion December 5, 1941 (R 41) awarding judgment in favor of the plaintiff for the sum prayed for in his Complaint (R 41-49). The opinion of the District Court appears in the record at pages 41-49. Findings of Fact and Conclusions of Law were made and filed December 23, 1941 (R 49-75), and Judgment in favor of plaintiff and against the defendant was made and entered the same day (R 75-76). Notice of Appeal was filed January 31, 1942 (R89-90). The Record on Appeal was certified by the Clerk of the District Court March 2, 1942 (R-303) and filed in this Court March 5, 1942 (R-304). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U. S. C. A. Sec. 225 (a).

STATEMENT OF THE CASE

This is a suit filed by the Appellee against the Appellant on a Certificate of Insurance issued by the Appellant to Eric A. Krussman (R 1-16). Mr. Krussman died August 2, 1940, (R-14). The Appellant in its Answer denied liability because the deceased failed to pay the monthly premiums as agreed in the Contract by reason whereof he became suspended as

a member and his Certificate of Insurance became void and was never thereafter reinstated (R-22-38, R-199). The Appellee, claiming to be the beneficiary, admits that various monthly payments became delinquent, but contends appellant accepted the delinquent payments made out of due time and thereby waived certain provisions of the contract relating to forfeiture, reinstatement, good health, etc. The waiver is denied by the Appellant and the right to insist upon said contractual obligations, as hereafter pointed out, was affirmatively asserted.

The appellant is a fraternal benefit society, organized under the laws of the State of Nebraska, having a lodge system, a ritualistic form of work and a representative form of government. It is conducted solely for the mutual benefit of its members and not for profit. (R 108). It qualified under the laws of Idaho and operates pursuant to Title 40, Chapter 23, I. C. A., 1932, dealing with fraternal benefit societies. A brief analysis of the contract with the appellant's interpretation thereof follows:

On August 7, 1935, Eric A. Krussman made application for membership in the society and sought its insurance advantages. In his application it is recited:

"I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the Association now in force or that may hereafter be adopted shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by the Sovereign Camp of the Pacific Woodmen Life Asso-

ciation, whether printed or referred to therein or not.” (R 104-5).

The name “Pacific Woodmen Life Association” was, subsequent to said application, changed to the present name of “Omaha Woodmen Life Insurance Society.”

On September 30, 1935, there was issued to Eric A. Krussman by the appellant an insurance certificate, a copy of which is pleaded *haec verba* in the complaint. (R 3-9, Plaintiff’s Ex. No. 2). This certificate, among other things, recites that there should be paid a monthly sum “of \$11.70 on or before the last day of each month thereafter.” (R 4). Such payment was required before the end of the month for which it became due. The Certificate contains the following provision:

“This Certificate is issued and accepted subject to all of the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The Articles of Incorporation and the Constitution, Laws and By-Laws of the Association, and all amendments to each thereof which may be made hereafter; the application for membership, * * * and this Certificate shall constitute the agreement between the association and the member, and copies of the same, certified by the Secretary of the Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the Articles of Incorporation, or the Constitution, Laws and By-Laws of the Association, made subsequent to the issuance of this Certificate, shall bind the member named herein and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments were in force

at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the member, this Certificate shall be null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the member, or other act by any Camp Officer or members of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract.” (R 5, 6) .

There is a conspicuous recitation in the certificate as follows:

“IMPORTANT. No camp or officer thereof nor any officer, employee or agent of the Assoc. has authority to waive any of the conditions of this beneficiary certificate or of the Constitution and Laws of this Association.” (R 7-8) .

The Constitution, Laws and By-Laws of the Society form part of said contract and reference to certain provisions therein is deemed advisable. These are in pamphlet form and there were three of them introduced in evidence by the Appellee as Plaintiff’s Exhibits 3, 4 and 5. (R 108-125) . Plaintiff’s Exhibit 3 was in effect in its entirety when the Certificate was issued to Mr. Krussman. Plaintiff’s Exhibits 4 and 5 show some amendments in various sections adopted after Mr. Krussman’s Certificate was issued and before his death.

Section 63 of the Constitution, Laws and By-Laws of the Appellant, in force when Mr. Krussman became a member, among other things, provides:

“Sec. 63 (a) . In order to accumulate and maintain funds for the payment of benefits stipulated in bene-

ficiary certificates held by members of this association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of expenses of this association, every member of this association shall pay to the financial secretary of his camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp Fund; and he shall also pay such camp dues as may be required by the By-Laws of his camp.

(b). If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the association shall thereby completely terminate, * * * (Ex. 3, R 119-120).

In 1939 Section 63 (b) was amended to read as follows:

“If he fails to make any such payment on or before the last day of the month *it shall thereby become delinquent*, he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, * * * ” (Pls. Ex. 5).

Section 65 of the Constitution, Laws and By-Laws is particularly important. Briefly it is therein provided that if a member fails to make his payment as and when the same becomes due he may nevertheless thereafter, within the time therein stated, make such payment to the Society and the Society is required to accept the same, but that such payment is a warrant that the member is in good health and will remain

in good health for thirty days after such attempt to again become a member, and that the retention of said payment shall never be construed as a waiver of any of the provisions of said section or of the contract until such time as the Secretary of the Society shall have actual, not constructive or imputed knowledge that the person was not in good health when he attempted to become a member, and that receipt and retention of any delinquent payment, in case the person is not in good health shall not make the person a member or entitle his beneficiaries under his Certificate to any rights whatever. At the time Mr. Krussman became a member of the Association Section 65 was as follows:

“Sec. 65. Any person who has become suspended because of non-payment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of the assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the

retention of payment of such installments of assessments in case such a person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever." (Pl. Ex. 3, R 61-62).

Said section was amended to take effect as of September 1, 1937 and as thus amended provided:

"Sec. 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

"Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making payments shall be received and retained without waiving any of the provisions of this Section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever." (Pl. Ex. 4 R-62-63)

Said section was again amended to take effect as of September 1, 1939, and as thus amended provided:

“Sec. 65. Any person who has become suspended by his failure to pay any monthly installment may, if living, within fifteen days from the date of his suspension again become a member of the Society by the payment of the delinquent installment to the Financial Secretary of the Camp. After fifteen days and within three months from the date of his suspension he may again become a member of the Society by the payment of the delinquent installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

“Whenever payments are made by a person who has been suspended for more than fifteen days for the purpose of again becoming a member, such payment shall be hld to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended by not making payments, as well as all subsequent payments by him made, shall be received and retained by the Society without waiving any of the provisions of this section, or of these laws, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. Provided, that the receipt and retention of such payments, in case such person is not in good health, or does not remain in good health for thirty days thereafter, shall not make such person again a member of the Society, nor entitle him or his beneficiary or beneficiaries to any rights whatever.” (Pl. Ex. 5, R-63, 64).

The essential points for which appellant contends herein were not changed by the amendments except that in each instance the contract was made more certain in determining the necessity of prompt payment of installments and that the tender of such delinquent payments was for the purpose of reinstatement. We have quoted the section from each of these exhibits for convenience of this Court and call attention to the fact that the trial court likewise quoted them in its Findings (R-61-64).

Section 66 of the Constitution, Laws and By-Laws provides:

“Sec. 66 (a) The retention by the Association of any installment or assessment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or any estoppel upon the Association.

(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment or assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the Certificate shall be null and void.” (R. 64, 65).

Section 82 (a) of the Constitution, Laws and By-Laws of the defendant, provides:

“Sec. 82 (a). No officer, employee or agent of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions

upon which Beneficiary Certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these laws, nor shall any custom on the part of any Camp or any number of Camps,—with or without the knowledge of any officer of such Association—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every Beneficiary Certificate is issued only upon the conditions stated in and subject to the Constitution and Laws then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these Laws by the Association or an estoppel of this Association.” (Pl. Ex. 3, 4 R. 65, 66).

Section 107 (g) of the Constitution, Laws and By-Laws of the defendant, adopted June, 1939, which section is substantially the same as the provisions of Section 109 (g) of the 1935 Constitution, Laws and By-Laws provides:

“Sec. 109 (g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such acts.” (R-66).

The Appellee urged at the trial that Sections 103 and 109 of the 1939 Constitution (Pls. Ex. 5) were of some importance. These sections merely provide that the Financial Secretary for each local camp may be appointed by the President and Secretary of the Society and shall have charge of the accounts and collection from the members and transmit the same to the Society on or before the 5th day of each month after the dues shall have been collected. The authority of the

Financial Secretary is limited by said sections and other provisions of the contract heretofore quoted provide that he cannot waive any provisions thereof and any information which he may have received in the performance of his limited duties could not be imputed to the Society.

About September, 1936, Mr. Krussman failed to pay his current installment. Thereafter, and within the time permitted by his contract he made such payment. He was then in good health and the delinquent payment reinstated his contract which had become automatically cancelled. This occurred a number of times thereafter. All delinquent payments made and accepted prior to June, 1938, become unimportant because up until July 22, 1938, Mr. Krussman remained in good health and the receipt of the overdue payments made thirty days before his illness in each instance reinstated his contract.

On July 19, 1938, Mr. Krussman tendered his check for the June installment (Pl. Ex. G 24 R. 231). It was, of course, received by the appellant with the contractual warranty that he was in good health and would remain so for a period of thirty days thereafter. His contract was then void. On July 22, 1938, he suffered a paralytic stroke from which he never recovered. In July, 1940, he suffered a second stroke and died August 2, 1940. Both strokes were due to cereberal hemorrhage. During this period of two years he was not in good health, but was totally incapacitated (Pls. Ex. 7, R. 131, Pls. Ex. 8, R. 131-2, Pls. Ex. 9, R. 132, R. 277-86) His ill health during this period of time is not denied or questioned by the appellee.

After Mr. Krussman suffered his first stroke no current

payment was thereafter made, except on August 1st, 1940, a check was drawn by the daughter of Mr. Krussman in favor of Morris Sheppard, Treasurer of the Society for July and August installments. This check was received by the appellant August 8, 1940—six days after Mr. Krussman's death.

No officer of the appellant was ever advised of the ill health of Mr. Krussman and none of them had any knowledge or information of this fact until after his proofs of death were submitted (R. 199, 208).

If Mr. Fleming the Financial Secretary of the local camp had any knowledge of Mr. Krussman's ill health he failed to advise the Society and his knowledge pursuant to the terms of the contract could not be "imputed" to the appellant and he could not waive any of the provisions of the contract (Sec. 65).

The appellant was compelled to accept the tender of these delinquent payments under the terms of the contract. They were received for the purpose of reinstatement (R. 220). Each tender came with the warranty that Mr. Krussman was in good health and would remain in good health for thirty days thereafter, and in each instance, after July, 1938, such warranty was untrue, hence the contract never became reinstated and was void on the date of his death (Sec. 65, R. 206, 7).

The theory of the appellee seems to be that because the delinquent payments were accepted the appellant waived the right to insist upon the warranty of good health, and that the knowledge of the Financial Secretary was imputed to the Society; and, notwithstanding the plain provision of the con-

tract, appellee contends the Society became estopped from urging that the contract was void. The trial court found in favor of the appellee.

The Findings of Fact, Conclusions of Law and Judgment appear in the record at pages 49 to 76. Objections to the Findings, Conclusions and Judgment, and a Motion to Strike, Amend and Substitute were filed and submitted to the court by the appellant in which the fundamental position of the appellant is stated (R. 76-89).

This appeal is prosecuted from the Judgment (R. 89, 90). With the notice of appeal, appellant filed its statement of points which further emphasize the issue (R. 295-300).

SPECIFICATIONS OF ERROR

I.

The Court erred in finding and concluding that the acceptance by the Appellant of delinquent payments tendered by and on behalf of the deceased, Eric A. Krussman, in his lifetime constituted a waiver by the Appellant of the provisions of the contract relating to suspension and forfeiture, and in concluding that under the facts in this case Mr. Krussman was never suspended as a member, nor his contract affected and that the question of his reinstatement did not arise (R. 44, 45-67-71-73). The conclusions reached in each instance are contrary to the terms of the contract and against the law.

II.

The Court erred in admitting in evidence over the objec-

tion of Appellant, that the same was immaterial, Plaintiffs Exhibit "C," "D" and "F" being circular letters and Plaintiff's Exhibit "D," "F," and "G" being checks referred to therein (R. 159-170) and in making a finding thereon (R. 55, 56). Such exhibits had no effect upon the question of waiver or estoppel, particularly because there was no evidence introduced of any kind or character that the writer of said letters or any of the officers of the Society had any knowledge or information that Mr. Krussman was not in good health by reason whereof and of his delinquent payments said contract was void.

III.

The Court erred in making that part of Finding No. II to the effect that Eric A. Krussman "remained such member in good standing and entitled to all the privileges and benefits appurtenant to said membership until his death which occurred on August 2, 1940," and that portion reciting: "which said certificate of insurance was in full force and effect at the time of his death (R-51), upon the ground and for the reason that in each instance said Finding is not supported by any competent evidence but on the contrary the undisputed evidence is that Eric A. Krussman was automatically suspended for failure to pay during the month of June, 1938, the installment which became due that month, and his certificate became void and was never thereafter reinstated because he never thereafter remained in good health for thirty days and could not have been reinstated.

IV.

The Court erred in making Finding No. VII that "there

is no evidence in the record that any notice or warning of any kind was ever given to the insured that his certificate was not in full force and effect" (R. 56) for the reason that the same is not within the issues of said cause and is immaterial for any purpose and, if true, would not constitute any reason for judgment in favor of the plaintiff, more particularly because the contract between the Society and the member did not require Notice of Suspension, but, on the contrary, the suspension for non-payment of dues was automatic and self-operative and the member was charged with knowledge of such provisions.

V.

The Court erred in making that part of Finding No. XVII whereby it finds "that the insured was not suspended nor was his certificate null and void" and that the payment made on July 21, 1938, and applied on the June, 1938 installment was received and accepted by the defendant for the purpose of continuing in force the insurance certificate," and in finding that "it is not true that after June, 1938, every or any of the payments made by the insured and received by the defendant were made after the certificate terminated and became void and the member suspended" (R. 67), particularly because said statements are contrary to the evidence and to the contract involved and against the law controlling the case.

VI.

The Court erred in finding and concluding that Basil Fleming was the Agent of the Appellant and acquired knowledge of Mr. Krussman's condition while he was acting within

the scope of his powers and duties (Finding No. XVIII) and in finding that "it is presumed * * * that such knowledge was communicated to the defendant, and if not, would be imputed to the defendant" (R. 69-74) particularly because Fleming had no such powers as an agent and the contract expressly provided that the Secretary of the Society must "have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member." (Sec. 65).

VII.

The Court erred in making Finding No. XIX to the effect that "during the whole of the time that Krussman was in ill health and from the time of the issuance of his certificate of insurance the defendant treated him as a member in good standing and that none of said payments were made for the purpose of reinstatement, and that defendant waived prompt payment of monthly installments, and that none of said payments made to the defendant and retained by it was a guarantee, representation or warranty that the said insured was in fact in good health or that he would remain in good health for any period of time" (R. 70) because said Finding is not supported by any evidence, but is contrary thereto, and contrary to the provisions of the contract, and particularly to those provisions providing that the payment of delinquent installments and their acceptance by the Society was for the purpose of reinstatement as provided in sections of the Constitution, Laws and By-Laws, numbered 65, 66 (a) and (b), and such acceptance of delinquent payments did not and could not have constituted a waiver of any rights under the contract,

but that the making of such payment by the insured constituted a warranty of good health, which warranty after July 1938 was false.

VIII.

The Court erred in making Finding No. XX to the effect that the Appellant, in accepting payments after the end of the month in which they became due did not act upon any guarantee, representation or warranty that Mr. Krussman was in good health "and there was no false or untrue warranty" and in finding that knowledge had been imputed to the defendant prior to the death of Mr. Krussman that he was not in good health and that the "retention of payments made after default" and "defendant's course of dealing constituted a waiver of the right of defendant to insist upon prompt payment as in the contract provided and of the right to forfeit or terminate said contract, and could and did constitute an estoppel on the part of defendant to resist payment under the certificate, and finds that said certificate was not void of or no force or effect after the 22nd day of July, 1938, or at any time, but finds that the same was in full force and effect during said time and at the date of the death of the said Eric A. Krussman" (R. 70, 71), because said finding is not supported by the evidence, but is contrary thereto and is against the law and fails to recognize the provisions of the contract respecting the warranty of good health and the necessity on the part of appellant to accept tendered payments by one in default, which payments come with a warranty of good health.

IX.

The Court erred in making Finding No. XXI to the effect

that knowledge on the part of the Financial Secretary, Bazil Fleming, of the health of Eric A. Krussman during the time delinquent payments were made was material and in finding that the receipt of the checks by the Society and the application of the same to overdue monthly installments, and "the course of defendant's dealing with the insured could and did constitute a waiver of the provisions of said contract, and could and did constitute an estoppel of defendant in resisting payment herein, and that the tender made by the said defendant as set out in Paragraph VIII of these findings, was not made upon the erroneous assumption that Eric A. Krussman was in good health" (R. 71), more particularly because said Finding is not supported by any evidence but is contrary thereto and contrary to the provisions of the contract expressed in Secs. 65, 66, 82 and 109 (g) of the Constitution, Laws and By-Laws of the Society.

X.

The Court erred in Finding No. XXII to the effect that: "the sum of \$5000.00 is now due thereon from defendant to the plaintiff together with interest * * *" (R. 72) upon the ground and for the reason that the same does not constitute a Finding of Fact and is an erroneous conclusion and is not supported by the evidence in this case, but is contrary thereto.

XI.

The Court erred in each and all of its Conclusions of Law, Numbered III to VIII inclusive (R. 73-75) which are generally to the effect that the payment of delinquent installments

by the insured and their receipt and retention by the Society did not result in a suspension or forfeiture of the contract, even though the insured was in ill health when such occurred and that the Appellant waived and is estopped from insisting upon the enforcement of the provisions of the contract with respect to such matters, and that such knowledge as Bazil Fleming may have had as to the ill health of Mr. Krussman was imputed to the Appellant, notwithstanding the provisions of Sec. 40-2331 I. C. A., and in holding and concluding that the Certificate of Insurance was not forfeited, and that the beneficiary was entitled to judgment as therein recited, particularly because said Conclusions and all of them are contrary to the evidence and against the law.

XII.

The Court erred in overruling "Objections to Findings, Conclusions of Law and Judgment and Motion to Strike, Amend and Substitute" filed and presented by the Appellant for the reasons in each instance therein appearing (R. 76-89).

XIII.

The Court erred in entering Judgment in favor of the Appellee and against the Appellant in the sum of \$5,000.00, together with interest thereon at the rate of 6% per annum from the 8th day of August, 1941, until paid, and costs taxed at \$29.60 (R. 75, 76) or for any other sum or amount and in not rendering judgment in favor of the Appellant.

XIV.

Generally, the Court erred in failing and refusing to find

and conclude, under the evidence in this case and the law applicable thereto, that the contract sued upon was void on the date of the death of Eric A. Krussman; that there was no waiver of any contractual provision by the Appellant and that the Appellant, under the evidence, was not liable to the Appellee on said contract, and in not entering a judgment in favor of the Appellant.

POINTS AND AUTHORITIES

I.

The application, certificate, constitution, laws and by laws, and all amendments thereto constitute the contract. All provisions therein are binding upon the Society and the member and his beneficiaries. The member is conclusively presumed to know all of the terms of the contract and the nature and effect of each provision contained therein.

Van Dahl vs. Sovereign Camp W. O. W. (Neb.)
264 NW 454;

Whitehorn vs. Royal Arcanum (Neb.) 269 N.W.
821;

Bixler vs. Modern Woodmen of America (Va.)
72 S. E. 704;

Howton vs. Sovereign Camp W. O. W. (Ky.) 172
S. W. 687;

Kennedy vs. Grand Fraternity (Mont.) 92, Pac.
971;

Pope vs. Royal Highlanders (Neb.) 164 N. W.
1047;

- Wirtz vs. Sovereign Camp (Tex.) 268 S. W. 438;
 Modern Woodmen vs. Seargeant (Ark.) 69 S. W.
 (2) 397;
 Sovereign Camp vs. Newson (Ark.) 219 S. W.
 759;
 National Council vs. Smiley (Fla.) 100 So. 153;
 Sovereign Camp vs. Wheeler (Ga.) 146 S. E. 917;
 Stark vs. Sovereign Camp (Ky.) 225 S. W. 1063;
 Day vs. Supreme Forest (Mo.) 156 S. W. 721;
 Fowler vs. Sovereign Camp (Neb.) 183 N.W. 550;
 Fairbanks vs. Sovereign Camp (Neb.) 266 N. W.
 60.

II.

The appellant operates under Idaho statutory authority governing Fraternal Benefit Societies. A member is both insurer and insured. He is charged with full knowledge of his contract. The Statute establishes public policy of the state and the provisions of the contract and limitations against any waiver by Financial Secretary have statutory sanction and cannot be disregarded by the courts.

Session Laws Idaho 1911, Chapter 225;

Chapter 23 Title 40, I. C. A. 1932. See particularly sections 40-2303, 40-2309 and 40-2331, I. C. A. 1932;

Sovereign Camp W. O. W. vs. Moraida (Tex.)
113 SW (2) 177;

Woodmen of the World vs. McHenry (Ala.) 73
So. 96;

Sovereign Camp vs. Hart (Ga.) 200 SE 296;

Perry vs. Sovereign Camp (SC) 174 SE 397;

Beiser vs. Sovereign Camp (Ala.) 74 So. 235.

III.

In the case at bar the contract required the payment of monthly installments in the month for which the installment became due and if not so paid the member became automatically suspended and his certificate became void. These provisions are self-operative and automatic and no notice of suspension or forfeiture is necessary.

Whitlow vs. Sovereign Camp (Iowa) 202 N. W.
249;

Summerlin vs. American Fraternal Stars (Mich.)
167 N. W. 844;

Locomotive Engineers vs. Thomas 206 Fed. 409;

Sovereign Camp vs. Cox (Ala.) 127 So. 847;

Sovereign Camp vs. Anderson (Ark.) 202 S. W.
698;

National Council vs. Smiley (Fla.) 100 So. 153;

Sovereign Camp vs. Hart (Ga.) 200 S. E. 296;

Munger vs. Brotherhood (Ia.) 154 N. W. 879;

Howton vs. Sovereign Camp W. O. W. (Ky.) 172
S. W. 687;

Barganier vs. K. O. M. (La.) 85 So. 57;

Koehler vs. Modern Brotherhood (Mich.) 125
N. W. 49;

Balough vs. Supreme Forest (Mich.) 280 N. W.
83;

House vs. Grand Lodge (Tex.) 48 S. W. (2) 674.

IV.

Physical or mental disability does not excuse failure to pay in accordance with provisions of contract nor prevent forfeiture for failure to pay as therein required.

Hawkshaw vs. Supreme Lodge 29 Fed. 770;

Whitlow vs. Sovereign Camp (Ia.) 202 N. W.
249;

Bost vs. Supreme Council (Minn.) 92 N. W. 337;

Smith vs. Sovereign Camp (Mo.) 77 S. W. 862.

V.

The contract in the case at bar provides that a member who fails to pay his installment during the month for which same became due becomes automatically suspended and his certificate becomes void. He had a right, however, to pay delinquencies within three months under Section 65 of the Con-

stitution until amended effective September 1st, 1939, and within fifteen days thereafter. The Society was obliged to accept these tenders. They came, however, with a warranty that he was in good health and would remain so for thirty days thereafter and if the warranty was false the certificate was not reinstated. The acceptance of such payments could not constitute a waiver or estoppel (Secs. 63 a, 65 and 66 R. 61-66, 119-123). These provisions are binding upon the parties.

Corpus Juris Vol. 45 pages 145-7;

White vs. Sovereign Camp W. O. W. (S. C.) 192 S. E. 161;

Bixler vs. Modern Woodmen of America (Va.) 72 S. E. 704;

Tatro vs. Modern Woodmen of America (Ill.) 2 N. E. (2) 107;

Lester vs. Sovereign Camp W. O. W. (Tenn.) 110 S. W. (2) 471;

Kennedy vs. Grand Fraternity (Mont.) 92 Pac. 971;

Pickens vs. Security Benefit Assn. (Kas.) 231 Pac. 1016;

Sovereign Camp vs. Cox (Ala.) 127 So. 847;

United Order vs. Betts (Ark.) 14 S. W. (2) 1108;

Valentine vs. Head Camp (Cal.) 180 Pac. (2) ;

Adams vs. Grand Lodge (Neb.) 92 N. W. 588;

Soverign Camp vs. Cameron (Tex.) 41 S. W. (2)
~~832~~, 283

Van Dahl vs. Sovereign Camp (Neb.) 264 N. W.
 454;

Supreme Lodge vs. Grijalva (Ariz.) 235 Pac. 397.

VI.

The Financial Secretary, while appointed by the President and Secretary of the Society is nevertheless an officer of the local lodge, with limited authority. He has no power to waive any of the provisions of the contract, and even though he may know of the illness of a delinquent member and accepts delinquent installments such cannot constitute a waiver or an estoppel or reinstate a void contract.

Sec. 40-2331 I. C. A. 1932;

Sovereign Camp W. O. W. vs. Cameron (Tex.)
 41 S. W. (2) 283;

Sovereign Camp W. O. W. vs. Moraida (Tex.)
 113 S. W. (2) 177;

Sovereign Camp W. O. W. vs. Thacker (Tex.) 118
 S. W. (2) 1086;

Smith vs. Sovereign Camp W. O. W. (Mo.) 77 S.
 W. 862;

Modern Woodmen of America vs. Tevis, 117 Fed.
 370;

Kiker vs. Sovereign Camp W. O. W. (Ala.) 167
 So. 313;

- Valentine vs. Head Camp (Cal.) 180 Pac. 2;
- Koehler vs. Modern Brotherhood of America
(Mich.) 125 N. W. 49;
- Salter vs. Security Benefit Assoc. (Kas.) 243 Pac.
1033;
- Lester vs. Sovereign Camp (Tenn.) 110 S. W.
(2) 471;
- Sovereign Camp vs. Gay (Ala.) 93 So. 559;
- Havlicek vs. Western Bohemian (Minn.) 163 N.W.
985;
- Sovereign Camp W. O. W. vs. Hart (Ga.) 200
S. E. 296;
- Sweatman vs. Masons of Texas (Tex.) 33 S. W.
(2) 528;
- Day vs. Supreme Forest (Mo.) 156 S. W. 721;
- Whitehorn vs. Royal Arcanum (Neb.) 269 N. W.
821;
- Yarbrough vs. Sovereign Camp W. O. W. (Ala.)
97 So. 654;
- Beiser vs. Sovereign Camp (Ala.) 74 So. 235.

VII.

Even though a custom may be proved of accepting delinquent payments within the grace period, yet these payments are necessarily for reinstatement and their acceptance does not reinstate the policy if the member is not in good health.

Supreme Lodge vs. Grijalva (Ariz.) 235 Pac. 397;

Tatro vs. Modern Woodmen (Ill. Appeals) 2
N. E. (2) 107;

Van Dahl vs. Sovereign Camp (Neb.) 246 N. W.
455;

Lester vs. Sovereign Camp (Tenn.) 110 S. W. (2)
471;

United Moderns vs. Pike (Mo.) 76 S. W. 774;

Sovereign Camp W. O. W. vs. Muller (Ga.) 11
S. E. (2) 92.

VIII.

This case does not present a question of whether or not the appellant through its officers might waive provisions of its contract. There are no facts herein which were known to the officers upon which a waiver or estoppel could be legally predicated. The appellant did only that which the contract required, the doing of which cannot constitute a waiver or estoppel.

Sovereign Camp W. O. W. vs. Moraida (Tex.)
113 S. W. (2) 177;

Tatro vs. Modern Woodmen of America (Ill.)
(2) N. E. 107;

Order of United Commercial Travelers vs. Belue
263 Fed. 502.

I.

ARGUMENT

All provisions of the contract are binding upon the member and his beneficiary and upon the society. The member is conclusively presumed to know the terms of the contract and the effect of each provision. If monthly installment is not paid a member becomes automatically suspended and the certificate becomes void. These provisions are self-operative and automatic and no notice of forfeiture is necessary. Delinquent payments are made for the sole purpose of reinstatement and with a warranty that the member is in good health and will remain so for thirty days thereafter. The acceptance of such payments, without actual knowledge by the secretary or other corporate officer of the society of the member's ill health, cannot constitute a waiver or estoppel.

Specifications of Error Numbered I to XIV inclusive and the authorities cited under Points and Authorities Numbered I to VIII inclusive.

The trial court seemingly predicated its ruling upon the theory that because the Appellant accepted delinquent payments tendered by Mr. Krussman it led the member to believe that the contract was in good standing and thereby it waived the provisions of the contract relating to forfeiture and reinstatement, and that the knowledge of the Financial Secretary was imputed to the Society, and therefore the contract never became terminated or forfeited (R. 41-49). The contract itself is a complete answer to this position. A party to a contract cannot be estopped nor held to have waived its rights by doing that which the contract requires.

Sec. 63 of the Constitution, Laws and By-Laws definitely provides that a failure to make a payment within the month for which the same becomes due renders a Certificate void. Sec. 65 gives the member a positive right to reinstate his contract by payment of delinquencies within the time therein recited, provided he is in good health and remains so for thirty days. The Society had no right to refuse any payments made before Mr. Krussman's illness in July, 1938, because he had a right to make such payments, and being in good health his contract was automatically reinstated. After he became ill the Society may have refused the payment had it known of his illness (a matter not now necessary to discuss), but this knowledge was not possessed by any officer of the Society and was not imputed to the officers by information if any, which the Financial Secretary may have acquired, and he was unable to waive any provision of the contract. This is definitely provided in Sec. 82 and Sec. 107 (g) of the Constitution, and appears in prominent type on the face of the Certificate. This contractual restriction has Idaho legislative sanction in Sec. 40-2331 I. C. A. 1932.

The appellant is a corporation organized solely for the mutual benefit of its members and their beneficiaries and not for profit. It has a lodge system and a ritualistic form of work and a representative form of government (R. 198). The members of the Society adopt the Constitution, Laws and By-Laws. By this method they grant and restrict authority to the respective officers and agents and generally prescribe the method of transaction of business. In reality the member is both the insurer and the insured.

The character of the contract and the method of doing business has definite legislative sanction in Idaho. In 1911 the Legislature of the State of Idaho enacted Chapter 225, providing for the organization and conduct of the business of fraternal benefit societies of the type and character of the defendant. This Act was approved March 13, 1911, and with few amendments, is now Chapter 23, Title 40 of the Idaho Codes Annotated.

Sec. 40-2309 provides that the Constitution and Laws of the Society and all amendments thereto shall form part of the agreement between the Society and the member, and Sec. 40-2331 authorizes the provision that no subordinate officer shall have power or authority to waive any of the provisions of the Laws and Constitution of the Society, and that the same shall be binding on each member of the Society and all beneficiaries of membrs, thus we have a definite legislative policy prescribed and to which reference will be made in certain cases hereafter cited.

In the case at bar Mr. Krussman became a member and received his Certificate in 1935. He agreed to pay his insurance premiums in monthly installments. He began to fall in arrears in his payments while still in good health, but paid such delinquencies within the time permitted by his contract. He failed to pay his installment in June, 1938, until July 19th. He became ill July 22, 1938, and thus the installment so tendered was ineffective because he did not remain in good health for thirty days. He never regained his health and the payments thereafter made were accepted by the Society without knowledge of his ill health. He died August 2, 1940, and his proofs

of death revealed the fact that he had been ill for two years. The Society, in fairness to all other members, had no alternative but to reject the claim because the Certificate was and had been void since July, 1938. The Society tendered back all payments made from July, 1938, to the date of his death (Def. Ex. 21, R. 287).

The authorities definitely sustain the Appellant's position. We shall review only a few of them, but many more are cited in Points and Authorities, *supra*.

The cases hereafter reviewed are based on contracts identical or very similar to the one involved in the case at bar.

A case very much in point is Van Dahl vs. Sovereign Camp W. O. W. (Neb.) 264 N. W. 454. In this case suit was brought to recover upon a Certificate of the same character as the one involved in the case at bar. There had been failure on the part of the member to pay monthly installments as and when the same became due, but the payments were accepted by the Society after the member had become automatically suspended. The trial court rendered judgment for the beneficiary, but judgment was reversed by the Supreme Court of Nebraska. In this case it is held:

“Articles of Incorporation, Constitution Laws and By-Laws of fraternal benefit association, application for membership and certificate constitute contract between Association and beneficiary certificate holder.”

Also:

“By-Laws of beneficial association providing for payment of assessments made during month on certain day and for suspension without notice of members in

default are self-executing and provide reasonable and necessary penalty for enforcement of payment of assessments to fraternal insurance fund."

Also:

"Member of fraternal benefit association who had been suspended for nonpayment of assessments, can be reinstated only in strict conformity with By-Laws in force at time of reinstatement, and has no rights under his certificate until actual reinstatement has taken place."

Also:

"Where Constitution and By-Laws of fraternal benefit association provided that members suspended for nonpayment of assessments could be reinstated within three months by paying delinquent assessments to date, and that such payments should be held to warrant that member was then in good health and would remain so for thirty days, Association held not liable for death benefit when certificate holder died within thirty days after payment of delinquent assessments."

Also:

"Proof of practice of fraternal benefit association in accepting payments for purposes of reinstatement after member was automatically suspended for nonpayment of assessments, held not to establish course of dealing or custom to accept such payments which would estop association from asserting forfeiture on ground that holder was not in good health at time of payment or had failed to remain in good health for thirty days thereafter."

After the decision in the Van Dahl case, this matter came before the Nebraska Court again in the case of Whitehorn vs.

Royal Arcanum, (Neb.) 269 N. W. 821, in which the Van Dahl case is quoted at length with approval. In the Whitehorn case it is held:

“By-Laws of fraternal benefit association providing for payment of assessments monthly and for suspension if assessment is not made are self-executing.”

Also:

“Suspended member of fraternal benefit association can only be reinstated in strict conformity to by-laws, and has no right under Certificate until so reinstated.”

Also:

“Fraternal benefit association held not liable on benefit certificate on theory of waiver, where, after member was suspended for non-payment of assessment, he sent check to collector of local council, which collector retained until after member’s death.”

In the case of Tatro vs. Modern Woodmen of America, (Ill.) 2 N. E. (2d) 107, the defendant’s illness and its effect is considered. In this case it is held:

“Fraternal beneficiary society’s receipt of suspended member’s dues in ignorance of his illness does not constitute a waiver of requirement of good health at time of reinstatement.”

Also:

“Warrant, at time of reinstatement of suspended member of fraternal beneficiary society, that member is in good health, when in fact he is not, will vitiate reinstatement.”

“Insurance contracts are essentially of good faith and fact that member of fraternal beneficiary society might have been reinstated upon payment of delinquent assessments upon previous occasion should not give rise to right to work fraud upon insurer upon subsequent attempted reinstatement at time when insured is not in good health.”

In the case at bar it is significant to note that while some checks by which the delinquent payments were tendered were sometimes written to the treasurer of the Appellant, or to the Appellant in its corporate name, there was never a statement accompanying any of said checks advising of Mr. Krussman's illness. In other words, these tenders were made for reinstatement with the contractual warranty that he was in good health and each time, from July, 1938, said warranty failed. The Tatro case further holds:

“Burden of proving waiver, by fraternal beneficiary society of requirement that suspended member be in good health at time of reinstatement, it upon one seeking to avail himself thereof.”

In the case of *White vs. Sovereign Camp W. O. W.* (S. C.) 192 S. E. 161, the deceased referred to therein was a member of said Society and held a benefit certificate of the same type and character as the one in the case at bar. Some of the same sections quoted in this brief are quoted in this opinion. Mr. White fell into arrears with his payments. One of the defenses asserted by the Society in a suit on the certificate was that the member had been automatically suspended and was not in good health when his last payments were tendered. It was argued that the society had waived the right to insist upon the

provisions of its Constitution, Laws and By-Laws and was estopped in holding against the contention of the beneficiary. In disposing of this contention, the South Carolina Court, on Page 166, says:

“Under the contract of insurance the insured had the right to pay up these dues and become reinstated, conditioned, however, upon the warranty that he is in good health at the time of the payment of same and would remain in good health for a period of thirty days. The insurer, appellant herein, had the right to accept said dues—*more than that, was compelled to accept said dues or assignments, but was protected by the contract to the extent that the acceptance and retention by it of these dues was not a waiver of the condition that the insured was in good health and would remain in good health for a period of thirty days thereafter.* Except for the provision in the contract, the acceptance and retention of these dues would be some evidence of waiver on the part of appellant; and the acceptance and retention of the assessments and dues, or premiums from the insured, paid irregularly and after the month for which they were due, from the time that the insured became a member of appellant, might be some evidence of waiver on the part of appellant, except for the fact that the insured had the right to pay when he did and become reinstated subject to the provisions of the contract, and appellant could not have refused these payments.”

“Section 65 of the Constitution, Rules and By-Laws of appellant, made a part of the contract of insurance, provides that when a person becomes suspended for the nonpayment of dues and pays up such dues, the appellant may receive and retain same without waiving any of the provisions of the contract until such time as the secretary of the association shall have received *actual, not constructive* or imputive knowledge that the person was not in fact in good health

when he attempted to again become a member.* * *''
(Italics ours).

So, in the case at bar, the appellant was required by the very terms of its contract to accept these delinquent payments, even though it knew they were in payment of past due installments. They came with a warranty that the member was in good health, and under an agreement in the contract that the retention of such installments should not constitute a waiver of any of the provisions of the contract, or an estoppel upon the Society (R. 206-7).

In the case of *Bixler vs. Modern Woodmen of America*, (Va.) 72 S. E. 704, it is held:

“One who takes out a policy in a mutual benefit society becomes a member thereof and is bound by its charter and by-laws made in pursuance thereof, and is chargeable with knowledge of the limitations of the powers of agents of the society, found in the By-Laws.”

It is also held in this case:

“The By-Laws of a mutual benefit society provided for the reinstatement of a suspended member by his payment of assessments, if he was at the time of payment in good health; that otherwise the receipt and retention of the assessments should not reinstate him and prohibited the clerk of any local camp from knowingly receiving assessments from a suspended member, if at the time of tender of payment member was in impaired health. A member who had been suspended for non-payment paid arrearages while ill, and the clerk of the local camp who received the money had knowledge thereof. None of the directors or other officers of the society knew of member’s payment until

after his death. *Held* that the payment and reception thereof by the clerk of the local camp did not reinstate the member, and the society did not waive the forfeiture and was not estopped from setting it up as a defense.”

In the case of *Howton vs. Sovereign Camp of Woodmen of the World* (Ky.) 172 S. W. 687, it is held:

“The provisions of the constitution of a fraternal benefit order by the terms of its certificate of insurance constituting material parts thereof, were binding upon the insured and the beneficiaries.”

The case of *Modern Woodmen of America vs. Tevis*, 117 Fed. 369, was decided by the Eighth Circuit Court of Appeals. It very pointedly decides that a member of a fraternal benefit society is bound to know the provisions of his benefit certificate. The court holds:

“A principal may limit the authority of his agent, and when he does so the latter cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitations upon his power.”

Also:

“The insured and the beneficiaries under contracts with insurance companies and beneficial associations are charged with knowledge of the limitations upon the powers of the agents of the companies which are found in the policies or certificates or in the by-laws or applications which are part of their contracts, and they are bound by these limitations.”

The case also definitely holds that a fraternal benefit

society has the right to circumscribe and limit the powers of any of its agents, including the local secretary, and that the member is definitely charged with knowledge of these limitations.

In *Lester vs. Sovereign Camp, W. O. W., (Tenn.)* 110 S. W. (2) 471, suit was instituted upon a certificate identical with the one involved in the case at bar. The member had become delinquent in the payment of a number of his monthly installments and after his death suit was instituted for recovery under the certificate. The defense asserted is exactly the same as that asserted in the case at bar. A number of the provisions of the Constitution, Laws and By-Laws are quoted in the opinion, particularly Sec. 63 (a), (b) and (c); Sec. 64; Sec. 65; Sec. 66 (a) and (b); Sec. 67; Sec. 68; Sec. 109 (g); and Sec. 111. The Tennessee Court held:

“Under By-Laws of mutual benefit association which provided for reinstatement of member, provided member was in good health, association which had accepted monthly assessments after their due date while member was in good health was not estopped to deny liability on benefit certificate for member’s failure to pay monthly installments before the last day of the month, where installments for the month preceding month in which he died were paid a couple of days after his death.”

We suggest that the second stroke of Mr. Krussman occurred about July 22, 1940. His July payment had not been made. It was on August 1, 1940, that a member of his family wrote out a check for the July payment, which was already delinquent, and the August payment (Pls. Ex. G. 49, R. 236).

Mr. Krussman died August 2, 1940. The fact that the August payment was included in this check is significant. It clearly asserts knowledge on the part of the one who paid of the terms of the contract requiring current payments to be made. The Lester case further holds:

“Mutual benefit association’s acceptance of monthly assessments after their due date, while member was in good health, as authorized by its By-Laws did not estop association from denying liability on benefit certificates for failure to pay installments before due date, on ground that insured had been led to believe that association would accept installments in arrears after member became ill or from friends after his death.”

This case positively negatives the theory of the Appellee that the member was led to believe delinquent payments would be accepted with like effect as if paid on time and that the contract had not been forfeited.

The Lester case cites and relies upon the case of *Pickens vs. Security Benefit Association* (Kas.) 231 Pac. 1016, 48 A. L. R. 662. The *Pickens* case clearly points out that a custom of receiving installments after the months in which they are due and while member is in ill health, without knowledge on the part of the officers of the society, is quite different than if such payments had been received by the officers of the society with actual knowledge of the ill health of the member. It is not contended in the case at bar that the officers had any information of Mr. Krussman’s ill health until after he died. The most the appellee urges is that the local financial secretary may have had such information. This, as we will argue

later, even if true (which it is not necessary to admit) would not bar the society.

In *Sovereign Camp W. O. W. vs. Cox* (Ala.) 127 So. 847, it is held that:

“Failure of member of fraternal benefit order to pay monthly dues worked automatic suspension where Constitution and By-Laws, made part of the contract of insurance, so provided.”

Also:

“Parties are presumed to know the provisions of the contracts and by-laws made part of the insurance contract.”

and that:

“mutual benefit association was presumed to have received and retained money paid for insured reinstatement in accordance with provisions permitting reinstatement.”

So, in the case at bar it will be observed that the receipt and retention of all delinquent payments are necessarily presumed to be in accordance with the terms of the contract and not otherwise, and accordingly the member could not have been misled by paying delinquent installments.

In the case of *Koehler vs. Modern Brotherhood of America* (Mich.) 125 N. W. 49, it is held that:

“The fact that out of 17 assessments paid by the insured 12 had been accepted, though paid after the required date, does not amount to a course of conduct on the part of the insurer which will estop the insured from

claiming a forfeiture for want of prompt payment of a subsequent assessment.”

This case also holds:

“Where a condition for reinstatement to a mutual benefit association after suspension was that the member be in good health, the local secretary could not waive the condition by accepting the dues of a suspended member while he was in a dying condition.”

In *Pope vs. Royal Highlanders* (Neb.) 164 N. W. 1047, it is held:

“In a fraternal mutual benefit insurance association the application for membership is the certificate of insurance, and the By-Laws of the society constitute the contract between the insured and the society and all are to be construed together and considered with other evidence in the case to determine the rights of the respective parties.”

Also:

“Where a person voluntarily becomes a member of such association, he thereby assents to and is bound by the laws under which his membership is acquired.”

Further stressing the point that the failure to pay an assessment when due forfeits the contract without affirmative action on the part of the society, we cite the case of *Whitlow vs. Sovereign Camp W. O. W.* (Iowa) 202 N. W. 249. This case holds:

“Where by by-laws of association, failure to pay assessments on benefit insurance certificate works for-

feiture of certificate, failure to make such payments renders policy void without any declaration or affirmative act on part of association.”

Also:

“Physical or mental disability does not excuse failure to pay assessments on benefit certificate, which is self-forfeiting for failure to make such payments.”

In the case of *Sovereign Camp vs. Hart* (Ga.) 200 S. E. 296, many of the foregoing propositions of law are again considered. In this case Mr. Hart became a member of the lodge in December 1934. His certificate required that he pay his installments on or before the last day of each month. He paid on time for a few months. The April installment, however, was paid May 2nd, 1935. The May installment was paid June 4, 1935. The June installment was paid July 8, 1935. The July installment was paid August 7, 1935. The August installment was paid September 10, 1935. Mr. Hart died October 13, 1935. All payments were made to the financial secretary who knew that they were overdue. The society refused payment on the ground that the policy had never been reinstated and was void. Excerpts from the constitution, laws and by-laws of the society are quoted in the opinion. The plaintiff in this case urged that there had been an estoppel and a waiver. The court held:

“Where benefit certificate provides that Articles of Incorporation, Constitution, Laws and By-Laws of fraternal benefit association shall constitute the agreement between the association and the member, provisions of constitution, laws and by-laws relating to payment of dues and waiver thereof and suspension

for nonpayment of dues are binding upon the member.”

Also:

“Where constitution, laws and by-laws of benefit association provided for suspension of member for nonpayment of dues, the member became suspended upon the failure to timely pay the dues, by operation of the terms of the contract without affirmative or judiciary action by the association.”

This case also holds:

“Where constitution, laws and by-laws of fraternal benefit association provided for suspension of member for nonpayment of dues, and provided for reinstatement by payment of back dues while member was in good health, and provided that association’s retention of installments paid to reinstate suspended membership would not estop the association, that financial secretary, who accepted series of late payments of members’ dues, falsely reported member as paying on time, did not estop the association to insist on strict terms of the contract upon death of member occurring when dues for month in which he died were unpaid.”

The Hart case is further instructive in dealing with the distinction between a contract issued by a life insurance company which does not have the provisions in the contract contained in the case at bar, and a contract of the character under consideration. On Page 299 the Georgia Court, in dealing with this point says that where an insurer by custom and course of dealing with the insured, accepts without objection past due premiums when he could have insisted upon a forfeiture, it may be considered that such induced the belief on

the part of the insured that premiums received after they became due and within a reasonable time would be accepted, yet the Georgia Court says such is not the law in a case like the one under consideration, where the certificate, constitution, laws and by-laws form the contract and expressly provide that if a member "fails to make any such payments on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void." The court further says: "such provisions are binding upon the insured member" and consequently the doctrine of waiver or estoppel has no application. A consideration of this distinction relieves the case of many of the authorities relied upon by the Appellee.

It will be seen from the foregoing authorities and many others cited elsewhere in this brief that the appellant was required to accept Mr. Krussman's delinquent payments because the contract so provided. This, however, did not prevent suspension or voiding the contract. Such acceptance was a right he had to insist upon for reinstatement and so long as he was in good health such reinstatement occurred. When, however, he was in ill health such reinstatement could not occur, hence his certificate remained void. Mr. Krussman could not avoid knowledge of the provisions of his contract and the acceptance of these payments could not possibly prevent reinstatement, when he was in good health, else all of these provisions of the contract are meaningless.

But, the Appellee will urge that the Appellant treated him as a member and led him to believe he was a member, particularly in writing him the letters referred to in Specifications of Error No. II. This argument is without weight because there

is no showing that the officer of the company who signed and mailed such circular letter to Mr. Krussman had any knowledge of his ill health. The receipt of his delinquent payments were for reinstatement and if in good health he was reinstated. The transmission of letters and the refund check, therefore, could possibly have no effect when the officer who sent it knew nothing of his state of health, particularly because of these delinquent payments coming with a warranty that he was in good health and such officer had a right to rely upon the warranty and if it failed, as it did in the case at bar during the last two years of Mr. Krussman's life, then the contract remained void.

II.

The Financial Secretary has no power to waive any of the provisions of the contract and such knowledge, if any, as he may have possessed could not be imputed to the Secretary or other officer of the Society.

Specifications of Error Numbered V, IX and XI,
and the authorities cited under Points and Authorities Numbered II, VI and VII.

It was urged by the Appellee and found by the trial court, erroneously we contend, that the Financial Secretary of the local lodge, Mr. Bazil Fleming, had knowledge of Mr. Krussman's illness and with such knowledge collected delinquent installments, which it is contended, constituted a waiver, or an estoppel. There is no evidence that Mr. Fleming ever communicated the ill health of Mr. Krussman to the officers of

the Appellant. As a matter of fact, the officers of Appellant had no such knowledge until proofs of death were submitted (R. 208). The contract expressly provides that delinquent payments must be received and retained by the Appellant until the Secretary of the Appellant (not the financial secretary of the local lodge) "shall have received actual, not constructive or imputed, knowledge" that the person was not in good health when he attempted to again become a member. In the face of this clear provision of the contract the Court found that Bazil Fleming had knowledge of Mr. Krussman's ill health and that it was presumed "that such knowledge was communicated to the defendant, and if not, would be imputed to the defendant." This finding disregards the contractual and statutory provisions hereinafter referred to. The Financial Secretary is an officer of the local lodge. While it is true the Appellant has the right to name him and prescribe some of his duties, yet it is always to be remembered that he is one of a local group and for protection of the entire membership of the society his duties and rights are necessarily limited and controlled. There are 350,000 insured members of this Society (R. 182). To permit payment of delinquent installments when in good health relieves such member of physical examinations but the Society has a right to insist and rely upon the warranty of good health by one who tenders a delinquent payment. To guard against possible abuse it has been wisely provided that the local or financial secretary cannot waive any contractual provisions and knowledge of ill health of a delinquent member cannot be *imputed* to the Society.

Sec. 40-2331 I. C. A. 1932, which was enacted in 1911,

and which has direct reference to fraternal benefit societies of the exact character of the defendant provides:

“The Constitution and Laws of the Society may provide that no subordinate body, nor any of its subordinate officers or members, shall have power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and upon all beneficiaries of members.”

On the face of the Certificate delivered to Mr. Krussman appears the following:

“IMPORTANT. No camp officer thereof, nor any officer, employee or agent of the Association has authority to waive any of the conditions of this Beneficiary Certificate or of the Constitution, and Laws of this Association” (R. 7-8).

This Certificate further provides:

“Should this Certificate become void for any cause, acceptance of any payment from or for the member, or other act of any camp officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract.”

Sec. 82 (a) of the Constitution, Laws and By-Laws also provides that no officer or employee or member of any sovereign or local camp shall have the power or authority to waive any of the provisions of the contract and that knowledge of any such officer or employee of any fact or condition shall not constitute a waiver of the provisions of the contract or an estoppel of the Association.

Sec. 109 (g) of the Constitution provides:

“The financial secretary shall not, by acts, representations or waivers, nor shall the camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the constitution, laws and by-laws of this society, nor bind the society by any such acts.”

In the light of these statutory and contractual provisions it seems wholly illogical and unreasonable to say that a financial secretary could collect delinquent dues and obtain knowledge of the member's ill health, and, to shield the member, fail to make report of such conditions and then have such knowledge imputed to the Society. Such is not the law, as is clearly evidenced by the authorities hereafter recited.

In the case of *Sovereign Camp, W.O.W. vs. Cameron*, (Tex) 41 S.W. (2) 283, it is held:

“Knowledge, if any, by local clerk of insured's sickness held not binding upon fraternal beneficiary association where clerk had no authority to waive anything when accepting installments after forfeiture.”

The case of *Sovereign Camp, W.O.W. vs. Moraida* (Tex) 113 S.W. (2d) 177, is an extremely enlightening case on this point. Here the deceased had an insurance certificate identical with the one under consideration. He became a member of the Society on April 24, 1931. After becoming a member he paid his monthly dues regularly for a short time. He then began to fall into arrears, as did Mr. Krussman. The following is quoted from the opinion:

“Beginning with the payment required before the last day of August, 1931, he paid the same on September 8, 1931, and uniformly thereafter, up to and including the last payment made before his death, which occurred on February 16, 1933, such payments were not paid before the last day of the month in which they accrued, but were each paid in the next month succeeding their accrual. The payments were usually so paid by him around the fifth, sixth and as late as the eighteenth day of the succeeding month. Without a break in their sequence eighteen of such payments were made, including the two for December, 1932 and January, 1933, which were made respectively, for December, 1932 on January 7, 1933, and January, 1933 on February 4, 1933. It further appears that Moraida became sick about December 5, 1932, and that his illness was continuous from such time until his death on February 16th next. The assessments were paid to Gonzales, the financial secretary of the local camp, who knew of the insured's illness when he received the past due payments in January and February above referred to. The undisputed testimony discloses that the secretary always permitted members of the local camp to pay their dues monthly for the preceding month any time during the succeeding month prior to the date on which he sent his report to the Grand Lodge; and that he told Moraida he would be in good standing if he paid his assessments and dues before the Secretary sent his report to the Association.”

After Moraida died his widow instituted this suit to collect on said certificate. She took the position that the defendant had waived provisions of the contract requiring prompt payment and had become estopped to assert that the contract had been forfeited, particularly because of the knowledge of the finan-

cial secretary. We have here the identical issues raised in the case at bar. The Texas Court held:

“The knowledge of the financial secretary of a local camp of a fraternal beneficiary association with respect to the ill health of a member at the time of acceptance of delinquent assessments, acquired while secretary was engaged in the discharge of his official duties as collector for the camp, was not imputed to the association, so as to preclude the association from denying liability under provisions of its constitution and by-laws.

“The Legislature was authorized to empower fraternal benefit societies to require by their constitution and laws that no subordinate body or its officers should have power to waive any provisions of the laws and constitution of the society, and effect of statute could not be thwarted by judicial decree through estoppel.

“Under constitution and laws of fraternal beneficiary association prohibiting any local secretary from waiving provisions of the constitution and by-laws and providing that payment by member of a delinquent assessment while not in good health should void the policy, association, one of whose local financial secretaries accepted delinquent assessments while member was in ill health, without knowledge of association, was not estopped to deny liability.”

It is apparent from the foregoing cast that if Mr. Fleming acquired any information as to the ill health of Mr. Krussman it became wholly unimportant in this case because it was never conveyed to the officers of the Appellant and their acceptance thereafter of delinquent payments would be presumed for rein-

statement and came with a warranty of good health, which warranty, if false, nullified the effect of the payment.

It is to be observed that the Moraida case is predicated upon a statute identical with Sec. 40-2331 I.C.A. 1932. The Texas Court refers to the Texas Statute and to Sections 109, 66, and 65 of the Constitution, which we have heretofore quoted. The Texas Court then said:

“Mrs. Moraida contends that since the financial secretary of the local camp received and sent the installments of local dues for the months of December and January to the secretary of the association which received and retained same without protest until it received information of Moraida’s death, it (the association) thereby waived and became estopped to urge as a defense against liability the provisions of the constitution, laws and by-laws of the association above pointed out; and further that the practice and custom of the local camp in so receiving and forwarding to the association the past-due payments led the insured to believe that prompt payment according to the provisions adopted by the association would not be required, and that such practice and custom amounted to the making of a new contract between the parties. The Court of Civil Appeals in affirming the judgment of the trial court in effect so held. The principal ground for its holding is to the effect that knowledge of the financial secretary of the local camp acquired while engaged in the discharge of his official duties as collector for the camp is as a matter of law imputed to the association.

“The holding is in our opinion erroneous, in that its effect is to nullify the provisions of the constitution, laws and by-laws of the association obviously adopted by the association and agreed to by its membership for the purpose of guarding against such claims as that asserted in the present case. One of the specific pur-

poses for which they were adopted is to prevent the restoring to membership of a suspended person in ill health when such fact is unknown to the association, and to prevent reinstating him in a manner prohibited by the laws of the association governing membership and its privileges. Finally, the effect of the holding is to nullify and render of no avail the power conferred by the Legislature by Article 4846 authorizing the association to provide that neither the subordinate body nor any of its subordinate officers or members *shall have the power* to waive any of the provisions of its laws, and authorizing it to specifically require that such provisions 'shall be binding on the society and each and every member thereof and on all beneficiaries of members.' The Legislature was not without power to grant to fraternal benefit societies the authority conferred by Article 4846, and the exercise of such power cannot lawfully be thwarted by judicial decree in the light of the facts herein, stipulated by the parties. *Sovereign Camp, Woodmen of the World vs. Cameron*, Tex. App. 41 S.W. 2d 283, writ refused. Clearly neither the financial secretary of the local camp nor the camp itself could by their knowledge or acts do that which both were without power to do and which the deceased member had agreed they were without power to do."

Shortly after the decision of the Moraida case the Texas Court of Appeals decided the case of *Sovereign Camp, W.O.W. vs. Thacker* (Tex.) 118 S. W. (2) 1086. In this case the Court held:

"Under the provisions of the Constitution and laws of fraternal benefit association that certificate should be void for nonpayment of premiums, that payment of delinquent assessment by member would be retained without waiver of right to avoid certificate until actual notice to association that member was in good health

at time of payment, and that payment of delinquent assessment by member not in good health would avoid policy, and under provisions of Certificate that no officer of local camp of association could waive conditions of certificate or constitution and laws, acceptance of delinquent assessment by financial secretary of local camp of association when member was not in good health and receipt of such payment and retention thereof by home office until after death of member without actual notice of the condition of health of member at time of payment did not waive right of the association to forfeit certificate for non-payment of premium."

In this case attention is particularly called to the fact that the contract as set out therein is identical with the one in the case at bar. The defense is substantially the same and the holding of the Court is as we contend it should be in the instant case.

In *Woodmen of the World vs. McHenry* (Ala.) 73 So. 97 the same propositions of law are considered. In this case it is to be observed that Alabama, in 1911, adopted the same Act as was adopted by Idaho in the same year for the regulation and control of fraternal benefit societies. Sec. 20 of that Act is exactly the same as Sec. 40-2331 I.C.A. 1932. With respect thereto the Alabama Court says:

"This Act expresses the positive public policy of this state with respect to insurance contracts within its purview."

See also:

Beiser vs. Sovereign Camp W.O.W. (Ala.) 74 So. 235.

Yarbrough vs. Sovereign Camp (W.O.W.) (Ala.)
97 So. 654.

In Smith vs. Sovereign Camp W.O.W. (Mo.) 77 S. W.
862 it is held:

“The custom of the clerk of a local camp of a beneficiary association of accepting the dues of members in good health five days after they become due being in accordance with the constitution and by-laws of the order is no evidence of a waiver of payment when due by a sick member.”

In Modern Woodmen of America vs. Tevis, 117 Fed. 370,
heretofore cited in this brief it is held that:

“The by-laws of the Modern Woodmen of America, which constitute a part of the contracts with its members and beneficiaries, provide that a member who fails to pay a benefit assessment at the time specified for its payment is ipso facto suspended, and his benefit certificate is thenceforth void; that he may be reinstated within a certain time, if in good health, by furnishing a warranty of that fact and paying his arrearages; that the clerk of the local camp shall collect and remit to the head camp the assessments paid in accordance with the by-laws; that he shall report to the head camp suspended members; that he is the agent of the local camp, and not of the head camp; and that no act or omission by him shall create any liability or waive any immunity or right of the society. *Held*: (1) The clerk of the local camp is the agent of the head camp to collect and remit the benefit assessments in accordance with the term of the by-laws. (2) His authority is limited by the by-laws, and the members and beneficiaries are charged with knowledge of these limitations, because they are a part of their contracts. (3) The clerk of the local camp has no authority by

contract, estoppel or waiver to bind the society to its members or beneficiaries either by extending the time of payment of a benefit assessment, or by waiving default in its payment, or by reinstating a suspended member without a warranty of good health, in the absence of notice or knowledge of such acts and acquiescence therein by some of the principal officers of the head camp.”

In *Kiker vs. Sovereign Camp, W.O.W.* (Ala.) 167 So. 313 it is held:

“Knowledge of the secretary of the local lodge of benefit society that insured was not in good health and that certificate of good health had not been filed held not imputed to officers of society so as to charge them with waiver of such condition for reinstatement by acceptance of dues collected by secretary.”

The case of *Valentine vs. Head Camp, Pacific Juris. W.O.W.* (Cal.) 180 Pac. 2, is very enlightening. The defense of waiver and estoppel was here asserted on the theory of knowledge of the financial secretary. The court held in favor of the defendant mutual fraternal association. In this case it is held that the local camp clerk was nothing more than a special agent of the defendant with defined powers known to members, so that he could not waive any requirements of the law or organization or by any act or course of conduct create an estoppel against the defendant. The Court holds:

“In view of the limitations on the powers of the local camp clerk under laws of defendant fraternal organization, he could not by any course of conduct or possession of knowledge of insured’s bodily health bind defendant in such manner as to estop it from defend-

ing upon the ground that warrantly of insured as to bodily condition in application for reinstatement was false.”

In *Koehler vs. Modern Brotherhood of America* (Mich.) 125 N.W. 49, it is held:

“Where a condition for reinstatement to a mutual benefit association after suspension was that member be in good health, the local secretary could not waive the condition by accepting the dues of a suspended member while he was in a dying condition.”

In the case of *Salter vs. Security Benefit Association*, (Kas.) 243 Pac. 1033, the same proposition is presented as in the case above. In this case it is held:

“The acceptance by local officer of a fraternal beneficiary association of dues after membership has been lost by non-payment does not bind the association, especially under a statute which has been acted upon, authorizing such associations to adopt by-laws preventing waivers in its behalf by local officers.”

We most respectfully submit that the foregoing authorities and others cited under “Points and Authorities” definitely sustain the position of the Appellant in this case. The cases followed by the trial court are either out of harmony with the great weight of authority or clearly distinguishable from this case.

III.

Cases cited in the Opinion of the Trial Court.

Reference is made in the Opinion (R 43) to the case of Rasicot vs. Royal Neighbors of America, 18 Ida. 85; 108 Pac. 1048. This case was decided April 16, 1910. It deals with a contract of a fraternal benefit society and while there is some language contained therein with reference to the subject of waiver and public policy, yet it is to be observed that the Court did not have before it a contract of the type and character involved in the case at bar nor statutes such as were later enacted. We respectfully submit that upon the facts it is not an authority against the position assumed by the appellant. It is to be observed, however, that at the 1911 session of the Idaho Legislature there was enacted Chapter 225 for the regulation and control of all fraternal benefit societies doing business in Idaho. This Act was approved by the Governor March 3, 1911. It is not improbable that some of the language used in the Rasicot case may have induced the enactment. In any event, this legislative enactment determined the public policy in Idaho with reference to these societies differently from that suggested in the Rasicot case. As heretofore pointed out, there is contained in the Act Section 8, which is now Sec. 40-2309 I.C.A. 1932, which, among other things provides that "the Certificate, the Charter, or Articles of Incorporation * * * Constitution and Laws of the Society and the Application for Membership * * * and all Amendments to each thereof, shall constitute the agreement between the Society and the members" and also Sec. 20, which is now Sec. 40-2331 I.C.A. 1932, and which has heretofore been quoted, and which authorizes the

Society to provide in its Constitution that "no subordinate body" nor any "subordinate officer" may waive any provisions of its Constitution and Laws, and that such provision shall be binding upon each member and all beneficiaries.

These statutory provisions announce a public policy of the state. This view has been quite universally adopted by the courts. In 1911 Alabama enacted statutes almost identical with the Idaho Statutes above referred to. The Supreme Court of Alabama decided the case of *Woodmen of the World vs. McHenry*, 73 So. 97, in 1916 and was confronted with the argument that notwithstanding such legislative enactment there could be a waiver. On Page 98 the Alabama Court quotes the statutory provisions and particularly Sec. 8 and Sec. 20 which are the same as Sec. 8 and Sec. 20 of the 1911 Session Laws of Idaho. The Court then says:

"This act expresses the positive public policy of this state with respect to the insurance contracts within its purview. The provisions of the constitution, laws, and by-laws of the Sovereign Camp of the Woodmen of the World became and were factors in, and elements of the contract declared on in this action; and so in consequence of the enactment cited, in connection with the provisions of the laws of the order, which, in turn, in addition to the mandate of the statute (Section 8, pp. 703, 704, Gen. Acts 1911), gave appropriate effect to the application's provisions and requirements."

The Court then discusses the provisions of the contract and the argument urging a waiver, and says:

"The positive law of this state (Gen. Acts, 1911, ante) has intervened to preclude a waiver by such an agent. Its mandate, in connection with the laws of the order

and the provisions of the application, must be given appropriate effect.’’

The Texas Supreme Court, in the case of *Sovereign Camp vs. Moraida* (Tex.) 113 S. W. (2) 177, heretofore cited in this brief expresses its opinion on the effect of this statutory enactment on Page 180 by saying:

“The legislature was not without power to grant fraternal benefit societies the authority conferred by Article 4846 and the exercise of such power cannot lawfully be thwarted by judicial decree in the light of the facts herein * * *.”

These cases are illustrative of the holdings of the courts where the statutes are the same as the Idaho Statutes and the contract is of the same character as will be seen from numerous cases heretofore cited in this brief.

Aside from the fact that the *Rasicot* case was decided upon different facts and is not an authority against the Appellant herein, it is clearly apparent that any adverse effect of any dictum or statement therein mentioned is eliminated by the legislative enactment.

Reference is made in the Opinion of the Court to the case of *Conkling vs. Knights and Ladies Security* (Ia.) 166 N.W. 384, which is cited to support the contention that the delinquent payments were not made for reinstatement but to keep the policy alive (R. 45). Numerous cases hereinbefore cited definitely support the proposition that a waiver or an estoppel can never be insisted upon when the party against whom it is asserted has done nothing more than that required by its

contract. The Conkling case is quite different in some respects from the case at bar, but in any event, some time after it was decided the Supreme Court of Iowa decided *Whitlow vs. Sovereign Camp, W.O.W.* 202 N.W. 249, wherein the court had before it a certificate of the same character as in the case at bar and issued by the same Society. In the *Whitlow* case the Court enforced the provisions of the By-Laws and held that:

“Where, by the By-Laws of the Association, failure to pay assessments on benefit insurance certificate works a forfeiture of certificate, failure to make such payments renders policy void without any declaration or affirmative act on the part of the Association.”

Chandler vs. Royal Highlanders (Neb.) 162 N.W. 642 is cited in support of the proposition that the Society waived the right of forfeiture by accepting delinquent payments and this led the insured to believe prompt payment would not be insisted upon. It was held in this case, however, that there was no waiver and the statements for which the case is cited appear to be dictum. However, the facts discussed in the *Chandler* case, upon which a waiver might be predicated are quite different from the present case. Here delinquent payments could be made under the contract but they came for reinstatement and with a warranty of good health. If, however, the case should be considered contrary to appellant's position it is rendered ineffective by later Nebraska cases, upholding the forfeiture when dealing with contracts of the character now under consideration.

See:

Pope vs. Royal Highlanders (Neb.) 164 N. W. 1047;

Fowler vs. Sovereign Camp W. O. W. (Neb.) 183 N. W. 550;

Van Dahl vs. Sovereign Camp W. O. W. (Neb.) 264 N. W. 454;

Fairbanks vs. Sovereign Camp (Neb.) 266 N. W. 60;

Whitehorn vs. Royal Arcanum (Neb.) 269 N. W. 821.

There is cited the case of Kennedy vs. Grand Fraternity (Montana) 92 Pac. 971. In this case a statement is made to the effect that the Courts may find a waiver where the other party has been led to believe that strict enforcement of time of payment would not be insisted upon. However, the Montana Court holds against the waiver and on Page 976 says:

“But we are unable to see how this doctrine can have any application to the case at bar. Kennedy’s delinquency operated ipso facto to terminate his membership and to abrogate his contract.”

So, in the case at bar, Mr. Krussman’s delinquency operated ipso facto to terminate his contract and any payment thereafter made was for reinstatement pursuant to the terms of his contract and could not constitute a waiver. The Kennedy case, therefore, does not militate against the appellant but in reality is an authority in its favor.

Reference is made to the case of Order of United Travelers vs. Campbell, 115 Fed. (2) 743. We most respectfully suggest that this case does nothing more than announce what the

Circuit Court considered to be the law of the State of Washington as applied to the facts under consideration in that case. It is not an expression of the independent judgment of the Circuit Court of Appeals. Certainly the decision in the Campbell case would be different if the Supreme Court of Washington had decided the case of *Sovereign Camp vs. Moraida* (Tex.) 113 S. W. (2) 177, or *Van Dahl vs. Soverign Camp* (Neb.) 264 N. W. 454, or any other of the numerous cases cited in this brief.

Furthermore, it is to be noticed in the Campbell case the contract seemingly required a formal suspension of the Certificate and Notices were sent out for the delinquent installments and advice given concerning delinquencies, all of which is entirely absent in the case at bar. Any argument in this case that the member was mislead because the Society did precisely what the contract required is fallacious. There is no controlling court decision in Idaho contrary to appellants position and the statutes give it definite support. This Court, therefore, is free to give to these statutes and the contract under consideration a meaning which was obviously intended by the Idaho Legislature, and the membership of the Society. The clear and lucid opinions of numerous courts cited in this brief present compelling authority in support of the position of the appellant in this case.

CONCLUSION

In conclusion, therefore, we most respectfully urge that the learned trial court erred in the particulars herein before recited and in entering judgment against the appellant; that

said judgment should be reversed with directions to enter judgment in favor of the appellant.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF OF APPELLEE

Upon appeal from the District Court of the United States for
the District of Idaho, Eastern Division

FILED

MAY 25 1942

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BRIEF OF APPELLEE

STATEMENT OF FACTS

Inasmuch as the appellant's statement of the case is somewhat argumentative and does not cover definitely certain phases of the case, it is deemed advisable to make a brief statement of the facts not thoroughly covered in appellant's statement of the case.

On September 30, 1935, the certificate of insurance sued on herein was issued by the Pacific Woodmen Life Association to Eric A. Krussman, which insured his life in the sum of \$5,000.00, the same being payable to Sagred Marie Krussman, his wife, beneficiary therein named. On May 29, 1940, the beneficiary named in said certificate was changed to Marian

date received by the defendant, and all were applied in payment of monthly installments. Exhibit 19 further shows that no payment after September, 1936, was made by Eric A. Krussman during the current months except the payment for August, 1940, which was made the day before the death of said insured, but in every instance after September, 1936, payment was made by check (Exhibits G-5 to G-49, inclusive) and accepted by the defendant in the month following that in which payment was due and applied by the defendant for the installment falling due the previous month, excepting in three or four instances when the insured made payment for 2 previous months, which payments were accepted by the defendant and applied for the installments due the 2 previous months.

Exhibit G-17, being a check made payable to the defendant, dated December 12, 1937, received by the defendant on December 16, 1937, and applied by the defendant in payment of installment for the month of November, 1937, shows by notation upon its face in the handwriting of the Financial Secretary (R.264-265), that it was in payment of Installment No. 11, being the November installment. And Exhibit G-18 is another check made payable to the defendant, dated January 17, 1938, and received by the defendant on January 20, 1938, which shows on its face that it was for the "No. 12 installment," being the December, 1937, installment.

There is no evidence whatsoever in the record that any warning or notice was ever given to the insured that his certificate was not in full force and effect, although the checks were made payable to the defendant and endorsed and accepted

by it, came under the defendant's observation monthly during a period of practically four years.

On February 25, 1940, the defendant forwarded to the Insured a form letter dated February 1, 1940, bearing the signature of its president (Plaintiff's Exhibit C, R. 159-162, inclusive) in which letter it is stated in the last paragraph thereof "Our Board of Directors has authorized the payment of a Cash refund for the year 1939 upon certificates in force for two or more years, and check for yours is herewith enclosed." (R.161). A check for \$10.55 (Exhibit D, R. 161) was enclosed in the letter.

On February 25, 1939, a letter bearing the signature of the president of the defendant-appellant was forwarded by the appellant to the insured (Exhibit E, R. 162-164, inclusive) in which it was stated among other things that on account of economies effected in 1938 the appellant was making another refund to each of its members over 2 years standing and that a check for such purpose (Plaintiff's Exhibit F, R.163-164) was inclosed in the letter payable to Eric A. Krussman.

On February 25, 1938, a letter bearing the signature of the president of the defendant-appellant (Exhibit F-1, R. 168-170, inclusive) was forwarded by the appellant to the insured in which it was stated among other things that on account of continued economies in management, etc. we are able to hand you the enclosed refund check. A check in the sum of \$10.55 (Exhibit H) was enclosed in the letter which was for the proportionate part of the savings accumulated in 1937 and distributed to all members who are entitled to it (R.170). The first time the insured became entitled to a

refund check was in 1938 and it was based on good standing as of December 1, 1937 (R.173). Each of these refund checks (R. 194) were made to all members who had been continuously in membership for 2 years or more and were in good standing at the end of the year, meaning the year previous to the year of the issuance of the checks.

Section 105 (a) and (b) of the 1935 and 1937 Constitution, Laws and By-laws (Exhibits 3 and 4) and Section 103 (a) and (b) of the 1939 Constitution, Laws and By-laws (Exhibit 5) contain the same provisions; and Section 111 of the 1935 and 1937 Constitution, Laws and By-Laws, contains the same provisions as Section 109 of the 1939 Constitution, Laws and By-Laws and said provisions were in effect from the time the certificate was issued to Mr. Krussman up to the date of his death, said sections reading as follows:

“Sec. 102 (a) The President and Secretary of the Society shall appoint and may remove at will a Financial Secretary for each Camp, who shall be paid at least the same compensation per member per month by the Camp as has heretofore been paid to the Clerk by the local Camp.”

“(b) The Financial Secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the Camp dues and Sovereign Camp fund payments and monthly installments thereof, and shall monthly pay the Camp dues so collected to the Banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the Society to the Secretary of the Society at the headquarters of the Society as provided for in Section 109.”

“Sec. 109. On or before the fifth day of every month the Financial Secretary of each Camp shall remit all the Sovereign Camp funds in his hands and all other funds due the Society to the Secretary of the Society. Such amounts shall be remitted in money order, certified check, bank cashier’s check, or bank draft with exchange, payable to the order of the Treasurer. Accompanying such remittances, the Financial Secretary shall also forward such detailed statement of the standing of the members in the camp as shall be required for the information of the Secretary of the Society, upon blanks furnished for that purpose.”

Monthly reports are prepared at the home office and sent out to the financial secretaries with a duplicate. The duplicate is retained by the financial secretary and the original sent back with the money (R.174). They are audited each month by the Auditing Department (R.175). The reports are due on or before the 5th day of each month, but were not received until about the 18th or 19th. That was the practice (R.181).

It was the practice and general custom of Bazil Fleming, financial secretary of the appellant at Pocatello, in dealing with a number of the members (R.261) and particularly the insured, to personally collect monthly payments of installments (R.262) after the month in which they became due, and it was his custom to call at the home of the insured where checks payable to appellant were handed to him by either the insured or someone in his behalf (R. 240, 251, 252). This practice continued with Mr. Krussman since about 1935. The checks in payment of the monthly installments bore the date that the financial secretary called for them (R.242).

The insured suffered a stroke on July 22, 1938, from

which he never fully recovered and was thereafter in a condition of ill health until the date of his death, approximately more than 2 years thereafter. Bazil Fleming, the agent of the company, saw the insured while he was in bed the day after his stroke (R.244) and from time to time thereafter discussed with Mr. Krussman the condition of his health (R.241). These discussions occurred when he would call for the checks (R. 242-243) and the financial secretary of the appellant knew at all times from the time that the insured suffered his first stroke until the date of his death that the insured was sick (R.248).

POINTS AND AUTHORITIES

I.

“The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture or a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake.”

The above proposition of law is quoted with approval in *Raiscot vs. Royal Neighbors*, 18 Ida. 85 at page 97, 108 Pac. 1048.

Palmer vs. Sovereign Camp, WOW 15 S. E. (2d) 655 (S. C.) ;

Zahm vs. Royal Fraternal Union of St. Louis
(Mo.) 133 S. W. 374;

Wacher vs. Life & Accident Ins. Co. of Nashville,
Tenn. (Mo.) 213 S. W. 869;

McMahon vs. Supreme Tent Knights of Maccabees
of the World (Mo.) 52 S. W. 384;

Order of United Commercial Travelers of America
vs. Campbell, 115 Fed. (2d) 743 (9th Circ.);

Conkling vs. Knights and Ladies of Security,
(Iowa) 166 N. W. 384;

Woodmen of World Life Ins. Soc. vs. Garner, 140
S. W. (2d) 414;

O'Connor vs. Knights and Ladies of Security,
L.R.A. 1917 (b) 897;

Schrum vs. Sovereign Camp W.O.W., 132 S. W.
(2d) 1091 (Mo.);

Head Camp, Pacific Juris, W.O.W. vs. Bohanna
(Colo.) 151 Pac. 428;

Fraternal Aid Union vs. Murray (Colo.) 254 Pac.
997;

LaGrow vs. Head Camp Pacific Juris, W.O.W.
(Colo.) 226 Pac. 1086;

Perrigo vs. Commercial Travelers Mutual Accident
Assn. (Conn.) 127 Atl. 10;

Edmiston vs. The Homesteaders, 144 Pac. 826
(Kan.);

Phillips vs. Brotherhood of Ry. Emp. etc. 285
N. W. 159 (Iowa);

Hartford Life & Annuity Ins. Co. vs. Unsell, 144
U. S. 439; 36 L. Ed. 496;

Sovereign Camp, W.O.W. vs. Newsom, 142 Ark.
132, 219 S. W. 759, 14 A.L.R. 903;

Satcher vs. Woodmen of the World Life Ins. Soc.
(S.C.) 18 S. E. (2d) 523;

Soleyman vs. Woodmen of the World (La.) 3 So.
(2d) 466;

II.

“Once a regular course of conduct on the part of the association in accepting overdue assessments without objection has become established, the only way the association can acquire the right to insist upon a forfeiture for failure to pay an assessment within the time fixed by the bylaws is by giving the insured personal notice that thereafter punctual payment will be required.” 38 Am. Jur. 523, section 113.

Zahm vs. Royal Fraternal Union, 133 S. W. 374
Mo.;

Steuernagel vs. Supreme Council of Royal Arcanum
137 N. E. 320 N. Y.

III.

“A provision that no subordinate lodge or officer shall have power to waive conditions does not prevent a waiver by the society itself or by the supreme body or its officers or agents.” 45 Corp. Juris. page 146, Sec. 117.

Trotter vs. Grand Lodge Legion of Honor, 132
Iowa, 513, 109 N. W. 1099;

Fries vs. Royal Neighbors of America (Mo.) 210
S. W. 130;

Steuernagel vs. Supreme Council R. A. (N.Y.) 137
N. E. 320;

Sovereign Camp W.O.W. vs. Tam. (Okla.) 216
Pac. 660;

Peterson vs. Modern Woodmen of America
(Wash.) 220 Pac. 809;

Lagrow vs. Head Camp Pacific Jurisdiction Wood-
men of the World (Colo.) 226 Pac. 1086;

IV.

“It is a well settled rule that the doctrine of waiver by acts and conduct is applicable to fraternal societies as well as to regular insurance companies. In fact, it is applicable to all conditions and contracts which may be assumed to have been waived by a continued course of conduct between the parties themselves.” Bonnet vs. Grand Lodge, V. R. T. 81 S. W. (2d) on page 367.

Zahm vs. Royal Fraternal Union of St. Louis (Mo.)
133 S. W. 374;

Wacher vs. Life & Accident Ins. Co. of Nashville,
Tenn. (Mo.) 213 S. W. 869;

McMahon vs. Supreme Tent Knights of Maccabees
of the World (Mo.) 52 S. W. 384;

Palmer vs. Sovereign Camp, W.O.W., 15 S.E. (2d) 655 (S.C.) ;

Sovereign Camp. W.O.W. vs. Newsom, 142 Ark. 132, 219 S. W. 759, 14 A.L.R. 903;

Soleyman vs. Woodmen of World (La.) 3 So. (2d) 466;

Trotter vs. Grand Lodge Legion of Honor, 132 Iowa, 513, 109 N. W. 1099.

V.

“Statutory law authorizing the constitution and laws of a fraternal benefit society to provide that no subordinate body can waive any provision of the by-laws does not prevent waiver of such provision by the supreme body, and the knowledge is imputed to it from the knowledge of its local council.” *Steuernagel vs. Supreme Council of Royal Arcanum* (N.Y.) 137 N. E. 320.

Peterson vs. Modern Woodmen of America (Washington) 220 Pac. 809;

Order of United Commercial Travelers of America vs. Campbell, 115 Fed. (2d) 743 (9th Circ.)

Sovereign Camp Woodmen of the World vs. Newsom 219 S. W. 759 (Ark.).

VI.

“Forfeitures are not favored in the law; courts in order to avoid the odious results of a forfeiture are not slow in seizing hold of such circumstances as may have been acted on in good faith and which indicate a waiver of strict compliance of the terms of the policy.”

Rasicot vs. Royal Neighbors, 18 Ida. 85-108 P. 1048;

Palmer vs. Sovereign Camp, W.O.W. (S.C.) 15 S. E. (2d) 655;

Satcher vs. Woodmen of the World Life Ins. Soc. (S.C.) 18 S. E. (2d) 523;

Soleyman vs. Woodmen of the World (La.) 3 So. (2d) 466;

Sovereign Camp Woodmen of the World vs. New-som, 219 S. W. 759 (Ark.)

VII.

“Upon an appeal from a judgment the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside,” Section 11-219 Idaho Code Annotated (1932).

VIII.

“It is the general, well-established rule that where, by a custom or course of dealing, a mutual benefit society has led a member to believe that prompt payment of premiums, assessments, or dues will not be required, but that they will be received and accepted after due, and that he will be considered in good standing, the society will be held to have waived prompt payment and to be estopped to invoke forfeiture for failure thereof, and the member will be deemed to be legally in good standing for such reasonable time

after he is delinquent as has theretofore customarily been allowed him in which to make payment." 38 Am. Jur. 523, Section 113.

Soleyman vs. Woodmen of World (La.) 3 So. (2d) 466;

Rasicot vs. Royal Neighbors 18 Ida. 85, 108 Pac. 1048.

IX.

The financial secretary of a local camp of a fraternal benefit society, who is the agent of the society to collect and remit dues of members, attend to the correspondence concerning standing of members, make all reports, mail all notices, assist in change of beneficiaries and perform other duties, is the agent of the society, and while acting within the actual scope of his authority binds the society, and notice to him of delinquency and health of the members under such circumstances is notice to the society.

Satcher vs. Woodmen of the World Life Ins. Soc. (S.C.) 18 S. E. (2d) 523;

Sovereign Camp, W.O.W. vs. Key (Ark.) 230 S. W. 576;

Palmer vs. Sovereign Camp, W.O.W. (S.C.) 15 S. E. (2d) 655.

X.

"The secretary of local camp of fraternal beneficiary association is 'agent' of sovereign camp of association, and association's laws attempting to circum-

scribe local secretary's authority and limit his power as such agent do not override general law governing relation of principal and agent, where secretary is appointed to office and can be removed at will by president and secretary of association." *Palmer vs. Sovereign Camp, W.O.W. (S.C.)* 15 S. E. (2d) 655.

Woodmen of World Life Ins. Soc. vs. Garner 140 S. W. (2d) 414 (Ark.)

Sovereign Camp W.O.W. vs. Key 230 S. W. 576 (Ark.).

XI.

Where the court has found as a fact that prompt payment of assessments has been waived and that the insured was not suspended, the question of his illness, and whether any of the officers of the Sovereign Camp had knowledge thereof, became immaterial, for the issue of fact does not concern reinstatement but suspension only.

Jones vs. Sovereign Camp W.O.W. (Ala.) 171 So. 359; also 178 So. 891;

Woodmen of World Life Ins. Soc. vs. Garner 140 S. W. (2d) 414 (Ark.);

Palmer vs. Sovereign Camp W. O. W. 15 S. E. (2d) 655 (S.C.);

Conkling vs. Knights and Ladies of Security 166 N. W. 384 (Iowa);

Harris vs. Sovereign Camp W.O.W. 15 S. E. (2d) 793 (Ill.).

ARGUMENT

Appellant's specifications of error (which attack the Findings and Conclusions of the Court), are so interrelated we deem it best to treat them as a whole in order to avoid repetition.

Appellant contends that all overdue payments were made for the purpose of reinstatement, rather than for the purpose of continuing the certificate of insurance in force, and that appellant did not waive strict compliance with its laws, constitution and contract with reference to prompt payment, and that the manner and way in which the appellant dealt with the insured over a long period of time does not, at this time, estop it from insisting upon strict and literal compliance with the laws, constitution and contract.

The findings of the Court (Finding No. 19, R. 70) supported by the evidence, are to the effect that appellant always treated insured in good standing and that the payments made by insured were not for reinstatement but were for the purpose of continuing the certificate of insurance in force, etc. As evidence of this fact there were no current payments made by Mr. Krussman after September 1936. At the time the certificate in this case was issued, and up until September 1, 1937, Section 65 of the 1935 Laws and Constitution of the appellant (Paragraph V of appellant's answer, R. 30), provided that if a member was suspended for failure to pay promptly his monthly premium the only way he could be reinstated would be by making all of the delinquent payments including payment of the installment for the *current month*. The undisputed record discloses that all of the payments from September 1936 to September 1937 were made after the month in

which they became due, and in no instance was there any current installment paid. These facts were actually known by the Home Office of the appellant for the reason that the insured made his checks directly payable to the appellant; the checks were collected by the financial secretary and transmitted to the appellant itself, who accepted and endorsed the same and made application of the proceeds on the certificate, and the appellant had actual knowledge of the time each installment was paid for a period of approximately 4 years, and had actual knowledge that none of the monthly payments of installments after September 1936 were paid during the current month (Finding of Fact No. 5, R. 54-55).

It is clear that until the effective date of said amendment the acceptance by the appellant of the delinquent payments could not have been for reinstatement under the strict interpretation of the constitution and laws for the reason that it was necessary that the *current* payment be made, which was not made, showing that the appellant was accepting said payments for continuing the certificate in force and not for reinstatement. Notwithstanding said amendment, the appellant did not change its practice of accepting delinquent installments and did not notify the insured that it intended to insist on punctual payments of said premiums, but continued the custom and practice so established until the death of the insured; and the appellant is precluded from insisting on strict compliance with the constitution, by-laws and certificate at this time for the reason that, if the company desired to change its practice in respect to accepting delinquent assessments, the law required that the insured receive notice of such change (38

American Jurisprudence 523, Section 113, Points and Authorities No. III).

As further establishing the fact that it was the clear intention of the parties that payments made by Mr. Krussman and accepted by the appellant company prior to and subsequent to September, 1937, (the effective date of said amendment) were made for the purpose of continuing the contract in force rather than for reinstatement, the court's attention is called to Exhibit F-1, being a form letter dated February 25, 1938, sent to the insured together with a refund check to him covering gains and savings on his certificate for the year 1937. This letter recognized that the insured had been in good standing with the appellant company for the years 1936 and 1937 and was in good standing on the first day of January, 1938. It will be observed that on February 25, 1939, a letter (Exhibit E. R. 162-164, inclusive) was signed by the president of the appellant inclosing a refund check and was sent by the appellant to the insured in which it was stated among other things that the appellant was making another refund to each of its members of over 2 years standing and that a check for that purpose was inclosed. Here the insured is told in plain language that he is and has been a member in good standing for over 2 years. On February 25, 1940, another letter signed by the president of the appellant company was forwarded by the appellant to the insured, Mr. Krussman, stating among other things that the board of directors had authorized the payment of a cash refund for the year 1939 upon certificates in force for 2 or more years and that the insured's check for that purpose was inclosed. These letters definitely stated to

the insured that he was and had been in good standing since January, 1936. They further show that the insured was recognized as a member in good standing during all of that time. When these letters and each of them were written the appellant had actual knowledge that the insured had been making his payments after the end of the month in which each became due and not in accordance with the strict and literal terms of the certificate and constitution and by-laws of the appellant. The trial court found that during all that time the appellant had actual knowledge of the time each installment was paid for nearly 4 years (Finding No. 5, R. 54-55). Notwithstanding this knowledge on the part of the appellant, it unequivocally told the insured that he was in good standing and had been for more than 2 years previous to each of said letters.

In view of the undisputed evidence in this case, it is very apparent that the insured, as a reasonable man, was led to believe, and did believe and understand, that prompt payment of monthly installments would not be required, but that they would be received and accepted after due, and that he fully believed that his certificate of insurance was in full force and effect and that he was a member in good standing in said society.

It seems to us that the insured could have come to no other belief or conclusion than that he was in good standing, when, in addition to all the other evidence in the record, the president of the company as late as February 1, 1940, wrote to the insured stating that "the Board of Directors had authorized the payment of a cash refund for the year 1939 upon certificates in force for two or more years," and had received

letters of similar import for prior years with refund checks enclosed. It seems to us that any reasonable person would have come to the same conclusion as the insured did in this case, that his certificate was in full force and effect. That the said insured did fully so believe is further evidenced by the letter which he wrote to his son, Harry E. Krussman, June 20, 1940 (Exhibit 16) creating the trust, in which he stated that he was going to change the beneficiary to his son, with instructions as to how the proceeds of the certificate in question should be paid, and closing his letter by saying that he had always been grateful to his son for what he had done and for what he would do in taking care of the handling of the proceeds of the certificate, which, the insured stated, was the most important thing to him which he could conceive of. As further evidence that he believed his certificate was in full force, he changed his beneficiary in the policy in May and July preceding the date of his death in August.

It is, therefore, clear from the record that the insured was lead to believe by the appellant, and did believe, that he was in good standing and that his certificate of insurance was at all times in full force and effect; and the record in this case clearly shows that there was a waiver on the part of the appellant as to prompt payment of monthly installments, and that the appellant is estopped from invoking the forfeiture of said contract for failure to make prompt payment, and the trial court so found and held (R.74).

The rule in this state is as stated in *Rasicot vs. Royal Neighbors of America*, 18 Idaho 85, wherein at page 97 the court approved the following doctrine:

“And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake.”

This same rule of law was announced in the case of *Order of United Commercial Travelers vs. Campbell*, 115 Fed. (2d) 743, wherein the Circuit Court of the Ninth Circuit, in affirming the judgment of the trial court states the law as follows:

“Too, it is the rule that the existence of a waiver depends upon the effect of the insurer’s actions upon the insured, not upon what the insurer intends. If the conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continued despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture. *Morgan vs. Northwestern National Life*, 42 Was. 10, 84 P. 412, 7 Ann. Cas. 382.”

(Points and Authorities I.)

It is contended by the appellant that the company did not have actual knowledge of the ill health of the insured and that there could be no waiver or estoppel on that account. Under the record in this case, it is submitted that the health of the insured is immaterial because the defendant treated the certificate sued on in force, and the question of reinstatement is not involved (Points and Authorities I., II., XI.). But, assuming for the purpose of argument that this question is involved, which we do not concede, let us consider briefly the

evidence on the question of actual notice. The financial secretary being dead, the only available testimony would be from the records of the defendant. Mr. Pakes did not say he had examined all of the records and files pertaining to this matter to ascertain whether the secretary or any other general officer of the company knew of Krussman's illness. It is undisputed that there was no concealment of Krussman's illness. The financial secretary had positive knowledge of insured's illness or condition right after his first stroke. Whether the financial secretary, the defendant's agent, whose duty it was to report the standing of members, failed to perform his duty and notify the secretary or the president of the appellant company, the record is silent except the statement of the assistant secretary that he had no knowledge of Krussman's illness, and that as far as he knew, no other officer did (R.208). It is quite probable that the secretary, the auditors or any of the officers of the Sovereign Company could have received actual knowledge without Mr. Pakes, the assistant, knowing it. The assistant secretary did not testify that he had made any examination of the records and files of the office of the appellant to ascertain whether any letter or other notice of the ill health of the insured had been given by the financial secretary, the appellant's agent. He stated that they did not examine the checks that were sent by the financial secretary when they came in and that the secretary or treasurer could not know all the details (R.182). If the assistant secretary did not examine the checks, it is fair to assume that the information could have been communicated without his knowing it. In any event knowledge would be imputed to appellant (Points and Authorities IX.)

In the case of *Rasicot vs. Royal Neighbors of America*, 18 Idaho at bottom of page 97, the court approved the following proposition of law:

“The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of Pringle’s conviction *to the head camp.*”

In *Steuernagel vs. Supreme Council of Royal Arcanum*, 137 N. E. 320, N. Y., the court speaking through Justice Cardozo, in paragraph 5 on page 323, says:

“The defendant attempts to avoid the effect of its inaction by the disclaimer of knowledge of the events which entitled it to act. We are without evidence that the local council made prompt report to the Supreme Secretary of the disappearance of the member. No such evidence is necessary. The defendant is chargeable with knowledge of the council, whether report was made or not. *Lewis vs. Guardian Fire & Life Assur. Co.*, 181 N. Y. 392, 396, 74 N. E. 224, 106 Am. St. Rep. 557. The duty of disclosure in the language of some of the cases is “presumed” to have been discharged (*Henry vs. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; *Hyatt vs. Clark*, 118 N. Y. 563, 569, 23 N. E. 891; *Mut. Life Ins. Co. of N. Y. vs. Hilton-Green*, 241 U. S. 613, 622, 36 Sup. Ct. 676, 60 L. Ed. 1202), and except in circumstances of adverse interests or of fraud, evidence will not be heard that the duty was ignored (2 *Mechem Agency*, pp. 1806, 1813). Knowledge being imputed, the courts are to interpret in the light of the imputation the significance of the events that followed. We start with the hypothesis that duty has been done.”

The question of reinstatement and health of the insured is not involved for the reason that the insured was not suspended (Finding No. XI. R. 56), as the appellant treated at all times the insured's certificate as continuing in full force and effect. (*Palmer vs. Sovereign Camp, W.O.W.*, 15 S. E. (2d) 655).

In the case of *Harris vs. Sovereign Camp, W.O.W.*, 23 N. E. (2d) 793, the identical contention was made by the defendant, and the court in disposing of such contention says on page 799:

“A case of particular interest in connection with the evidence and the law involved in the instant case, is that of *Route vs. Royal League*, 274 Ill. App. 152. In that case the facts in many respects approximated those in the instant case, and the pleadings were practically the same. The same contentions were made by the defendant on the point of reinstatement of the insured, but the Court pointed out in that case, as is clearly true in the instant case, that it was not a question of reinstatement of a suspended member which the Court was called upon to decide, but the question was whether or not the insured's membership had been suspended; whether or not the insurance had become forfeited: or whether the default in payment of the premiums had been waived. In that case the payment of the past due premiums was made to the association, and accepted, after the insured was dead. The Court in that case says (at page 173): ‘A fraternal benefit society will not be permitted to treat a benefit certificate as alive and in full force, and accept the member's money over a period of years in violation of suspension and forfeiture provisions of its contract until death occurs, and then for the first time seek to avoid the certificate and escape its liability. Neither will such an association be permitted to insist on the forfeiture

of a benefit certificate issued by it for nonpayment of assessments when due, where its course of dealings with the member has led her to believe that the provisions for forfeiture would not be relied upon.'

"The conclusions of the Court in the Routa case, *supra*, are equally valid in this case. The Court in that case determined that the insured continued as a member of the fraternal benefit association and that the certificate of the deceased had not been forfeited prior to death. In the instant case it is our conclusion that James Harris was never suspended from membership and that his certificate was never forfeited."

In *Woodmen of World Life Ins. Soc. vs. Garner*, 140 S. W. (2d) 414, the defendant set up as a defense, Section 65 of the Constitution, Laws and By-laws, which section is in substance identical with Section 65 set up in this case as a defense, the Court on page 415 in passing on the matter said:

"We think the trial court was correct in holding that Andrew J. Garner did not become a suspended member by reason of the irregularity of payments in the four instances above mentioned and that he did not make the payments subsequently 'for the purpose of again making him a member.' The second paragraph of Section 65, above quoted, is conditioned as follows: 'Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant,' etc. Now, if Mr. Garner did not 'become suspended,' the payments made by him although out of time, were not made 'for the purpose of again making him a member,' and all the remainder of that part of section 65 has no application. If not suspended, he never ceased to be a member. He was not suspended because he was never treated as a suspended member by either the Financial Secretary or the Home

office. He was never so advised. His money was accepted regularly or irregularly and no one connected with appellant ever advised that his payments were made merely for the good of the order. * * * Appellant has tried to avoid this rule of law by a provision in the latter part of said section 65 and the provision contained in subsection (a) of section 66, the former relating to what shall constitute a waiver, and the latter relating to both waiver and estoppel. Appellant can not thus relieve itself of the burdens of a positive rule of law by an ex parte declaration in its constitution, laws and by-laws, stating the conditions under which it will be relieved by waiver and estoppel. It would appear to be as much against public policy as it would for a railroad to contract against its own negligence, or that of its officers and agents."

In *Schrump vs. Sovereign Camp, W.O.W.*, 132 S.W. (2d) 1091 (Mo.) it was urged that under a similar defense as set up in the instant case, the delinquent payments were for reinstatement, and the Court, in holding that the payments were not made for reinstatement, but under the contract, said among other things, (p. 1095):

"In the present case current assessments, save two, were never paid along with the payment of delinquent assessments, and were rarely paid during the months the delinquent assessments were paid. The law of the association requires the payment of the current assessment as well as all delinquent assessments to entitle the insured to reinstatement."

Prompt payment of installments as provided in said certificate having been waived, the question of reinstatement and health is immaterial (Points and Authorities XI.). If the payments had been made in accordance with the terms of the

contract, it would be wholly immaterial whether insured was sick or even dead at the time payment was made. The indemnity is against death occurring while the certificate is in force.

In Conkling vs. Knights and Ladies of Security (Iowa) 166 N. W. 384, at page 387 it is stated as follows:

“While the contract provided that these payments should be made within the month to preserve the integrity of the certificate, the society permitted the assured to make payments after the month, and *treated his certificate as still continuing, and it must treat this payment the same.*” (Italics ours)

At page 390 the court further said:

“We think, therefore, the court was justified in holding that the previous dealing between these parties, touching the time of payment of dues, was of such a character (supposing the assured to be a man of reasonable prudence and caution), as to lead him to believe that the company was not insisting upon a strict performance of the contract, and that it was willing to receive payments at any time after the time fixed in the contract if made within a reasonable time, and that payments so made held the contract in force; that defendant’s previous conduct in accepting payments made after the time fixed in the contract was a waiver of its right thereafter to insist that the contract was forfeited by the failure to make payment strictly and in accordance with the terms of the contract; that it is now estopped to say that this payment was not made in time to keep the contract alive. *This being true, the question of reinstatement, under the other provisions of the contract, is not involved, for the payment made within the time theretofore recognized as sufficient to keep the policy alive was sufficient to avoid a forfeiture or suspension, and therefore there*

was no occasion for reinstatement, and the court so held." (Italics ours)

See also the case of Palmer vs. Sovereign Camp W.O.W. (S.C.) 15 S. E. (2d) 655, where it is stated on page 660:

"The fact that Palmer was not in good health, when he made his payments in the month following the month in which they fell due, will not relieve the association. The local financial secretary was fully advised of Palmer's illness, and payments made under those circumstances could not, as provided by the rules of the order, constitute a warranty of good health. The very information, which the local secretary received at the meeting of his Camp held on May 14th, was a denial of the warranty of good health; and the specific information imparted by Ray Curtis, the son-in-law of Palmer, when he paid the September and November assessments, of the illness of the insured, was likewise a denial of the warranty of good health, which the rules provided the payment imputed.

"It can not be successfully contended that if Palmer had in strict accordance with the by-laws made his payments of April, August, September, November, and December, 1938, and for March and May, 1939, before the last day of each of these months, the condition of his health at such times of payment would in any wise have been material. Nor can it be doubted that under the uniform practice and custom, Palmer, but for his death, could, and doubtless would, have gone on through the years making his overdue payments, and the local secretary and the Sovereign Camp would have gone on accepting and retaining such payments.

"We think that the doctrine of waiver and estoppel removed from the case the provisions for forfeiture and the effect of Code, Section 8047."

Jones vs. Sovereign Camp, W.O.W. 178 So. 891;
171. So. 359 (Ala.);

Satcher vs. W.O.W. Life Ins. Soc. (S.C.), 18 S.E.
(2d) 523.

Appellant throughout its brief predicates much of its argument on Sections 40-2309 and 40-2331 I.C.A. Section 40-2309 merely provides that the constitution, laws and amendments thereto shall form part of the agreement between the society and its members; this section merely declares what shall constitute the contract and has nothing to do with the law of waiver and estoppel. Section 40-2331 provides:

“The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members.”

It will be observed that said section does not authorize the appellant company or any of its officers to enact a provision restricting the society or any of its officers to waive any of its laws and constitution. It is therefore apparent that said section has no application because the waiver in the instant case was on the part of the appellant itself.

Points and Authorities III.

In *Steuernagel vs. Supreme Council of Royal Arcanum*, 137 N. E. 320, the defendant made the same contention as

the appellant is urging in this case with respect to the effect of the statute in question and the court speaking through Justice Cardozo, at page 323, in considering the effect of the New York statute, which is identical with the statute in this case, said:

“The defendant gets no aid from section 239 of the Insurance Law (Consol. Laws, c. 28): ‘The defendant is not charged with any waiver by the local council. It is charged with its own waiver, the inaction of the central body. Disability to waive is not the same as disability to learn and to report.’ ”

The rule of law approved in *Rasicot vs. Royal Neighbors* (Supra) with reference to waiver and estoppel, above set out, is in no manner affected by said section 40-2331, nor is the doctrine that waiver and estoppel applies to fraternal or lodge insurance, announced in the *Rasicot* case, affected or changed by said section.

It is asserted by appellant that said statutory provision announces the public policy of state. It will be observed from said section that there is nothing bearing upon public policy of state and there is nothing in conflict with what is said in *Rasicot vs. Royal Neighbors* (18 Ida. 85) wherein the Idaho court said at page 98:

“The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him, when acting honestly and from the most laudable motive, to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then when the benefi-

ciary comes to make demand for that paltry recompense to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large which we term public policy.”

Appellant contends that the case of *Conkling vs. Knights and Ladies Security* (Ia.) 166 N. W. 384, cited by the trial court in its opinion was not the last announcement of the Iowa Court, and quotes a paragraph from *Whitlow vs. Sovereign Camp, W.O.W.* 202 N. W. 249, without reciting the facts which were entirely different. In the last mentioned case the insured who had been a member of the defendant company became insane and thereafter application for old age disability benefits was made, and the certificate surrendered and released for a consideration, acknowledging complete satisfaction in payment under the certificate. The facts are so utterly dissimilar in the two cases that the *Whitlow* case does not in any way change the law announced in *Conkling vs. Knights and Ladies* (Supra). We invite a comparison of the two cases.

It would unduly lengthen this brief to attempt to review all the cases cited or quoted from by the appellant. But we will briefly analyze the facts in some of the cases upon which the defendant places principal reliance.

In *Whitehorn vs. Royal Arcanum* (Neb.), 269 N. W., 821, cited by the appellant, the facts are entirely different from the facts in this case, but the Court in that case approves the rule of law announced in the case of *Chandler vs. Royal Highlanders* (Neb.), 162 N. W. 642, in which it was held:

“If such association adopts a custom of receiving payment of dues after the day named in the contract for such payments, and thereby leads the assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association thereby waives the right to forfeit the policy for delay of payment which is tendered in accordance with such custom.”

In the case of *Tatro vs. Modern Woodmen of America* (Ill.), 2 N. E., (2d) 107, relied upon by the appellant, there was concealment and fraud involved, and the facts are entirely dissimilar to the facts in the instant case. However, since the decision in the *Tatro* case the Illinois Court in *Harris vs. Sovereign Camp, W.O.W.*, 23 N. E. (2d) 93 (*supra*), from which we have heretofore quoted, definitely holds against the contention of the appellant in this case.

In the case of *Valentine vs. Head Camp, Pac. Juris, W.O.W.* (Cal.) 180 Pac. 2, relied upon by the appellant, it appears that as far as delinquent payments were concerned, they were never reported to the head camp, although the clerk of the local camp had in the past advanced certain assessments; but in August, 1912, he failed to do so and reported the insured as delinquent for failure to pay his July assessment. It appears that this was the first intimation the head camp had of any delinquency, all previous reports showing that he had regularly paid his assessments. He was injured on August 17, 1912, and on August 19 the beneficiary paid the clerk of the local camp all amounts accruing for assessments and dues to September 1, including the July assessment. Application for reinstatement was signed by the insured after the injury in which

he warranted and represented that he was in sound bodily health. It is apparent that the facts in this case do not in any way resemble the facts in the instant case.

In the case of *Sovereign Camp W.O.W. vs. Hart* (Ga.), 200 S. E. 296, cited by appellant, an examination readily discloses facts very different from those in the case at bar. The home office of the association had no actual knowledge that any of the monthly installments had been paid to the Clerk of the local council after the expiration of the month for which they were due. Whereas, in the instant case the checks were made payable to the Sovereign Camp. The facts are so dissimilar that we are unable to see how the Hart case can be any aid in the solution of this case.

The appellant in support of its position cites the following cases from Alabama:

Sovereign Camp vs. Cox (Ala.) 127 So. 847;

Sovereign Camp vs. Gay (Ala.) 93 So. 559;

Woodmen of the World vs. McHenry (Ala.) 73 So. 96;

Yarbrough vs. Sovereign Camp W.O.W. (Ala.) 97 So. 654.

However, we find that the latest announcement from the Supreme Court of the State of Alabama supports the position of the appellee in the case of *Jones vs. Sovereign Camp, W.O.W.*, 171 So. 359 (Ala.), wherein at page 361 it was said:

“If insured was in fact never suspended, the question of his illness, and whether or not any of the officers, either local or sovereign, had knowledge thereof, became immaterial, for the issue of fact does not concern reinstatement, but suspension only.

“We conclude therefore, for the reasons stated under the agreed facts, the question as to insured’s suspension was one for the jury, and that the trial court committed error in giving for defendant the affirmative charge.”

Furthermore, an examination of the facts in the Jones case will readily disclose that they are not nearly as strong on the question of waiver as are the facts in the present case.

Appellant has quoted extensively from the case of *Sovereign Camp W.O.W. vs. Moraida* (Tex.) 113 S. W. (2d) 177. There is nothing in the *Moraida* case showing that the company had actual knowledge of the manner in which payments of the monthly installments were being made, when as in the case at bar checks were sent direct to the appellant, some bearing notations specifically setting forth the time monthly payments were being made. Furthermore, in the *Moraida* case there are no letters from the president of the Sovereign Camp to the insured stating that the insured was in good standing as is the fact in the present case. The case will disclose facts very dissimilar in many particulars from the facts in the present case.

In the case of *Van Dahl vs. Sovereign Camp W.O.W.* (Neb.) 264 N. W. 454, relied upon by appellant, the facts briefly are that the insured failed to pay installment for December, 1932, on or before the last day of the month, and on

January 16, 1933, he paid the delinquent installment for December and on January 31, 1933, he paid the installment for January. He died on February 4, 1933. It will be readily seen that the facts are so dissimilar to the facts in the instant case that the principles of law applied in that case would have no application here.

In the case of Balogh et al. vs. Supreme Forest Woodmen Circle, 280 N. W. 83, which is the latest case from the state of Michigan cited by appellant, the court at page 86 said:

“There is nothing to indicate that the defendant or the insured ever regarded the contract as in force during the periods between default and reinstatement.”

This distinguishes that case entirely from the case at bar.

We do not deem it advisable to make any further review of the cases cited by the appellant, as an examination of all cases cited by appellant will disclose that there is not one where the facts are parallel to the facts in this case. We are unable to find any case in which the insured dealt directly with the sovereign camp or head office by making all checks payable to the head office, bringing actual knowledge to the head office of the time each payment was made. In none of the cases cited by the appellant were letters forwarded to the insured advising him that he was in good standing and inclosing refund checks based upon said standing (as was done in the case at bar) or any case in which any letters were written stating that the contract was in good standing.

Appellant contends that the case of Order of United Travelers vs. Campbell, 115 Fed. (2d) 743, does nothing

more than announce what the circuit court considered to be the law of the State of Washington. The law of Washington found in paragraphs 1, 2 and 3 of this court's opinion is as follows:

“The Washington court adheres to the rule that the by-laws of a fraternal insurance society may be waived by a custom acquiesced in by the society. *Kennedy vs. Supreme Tent, Knights of Maccabees*, 100 Wash. 36, 170 P. 371. The acts and declarations evidencing the custom may be those of the society itself or those of its agent. And this is true even though the constitution of the order provides that the collecting officer of the local organization has no power to waive the provisions of the constitution. As a matter of law, the knowledge of the agent is the knowledge of the society. *Peterson vs. Modern Woodmen of America* 127 Wash. 412, 220 P. 809.”

“Too, it is the rule that the existence of a waiver depends upon the effect of the insurer's actions upon the insured, not upon what the insurer intends. If the conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continues despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture. *Morgan vs. Northwestern National Life Co.*, 42 Wash. 10, 84 P. 412, 7 Ann. Cas. 382.”

The law of Idaho announced in *Rasicot vs. Royal Neighbors of America* (supra) is the same as the law of Washington. It will be further observed that the language used in the Washington case is very similar to the language used in the case of *Rasicot vs. Royal Neighbors of America* on the question of waiver and estoppel and the rule of law announced in

the two cases is the same. Appellant seeks to avoid the affect of the Rasicot decision by the Idaho court by contending that it was decided prior to the passage of the statute in question and a different rule would have been announced had the statute been in effect at the time the Rasicot case was decided. It is significant to observe, however, that the supreme court of the state of Washington, when confronted with the identical statute, reached the same conclusion that the Idaho court reached in the Rasicot case, clearly showing that the statute does not destroy fundamental rules of agency nor does it affect the rule of law in Idaho with reference to waiver and estoppel.

The trial Court, in addition to finding on all other material allegations in favor of the appellee, found that the appellant at all times treated the insured as a member in good standing and that none of the payments were made for reinstatement (Finding 19, R. 70) and that none of the payments made to the appellant and retained by the appellant was a guarantee, representation, or warranty that the insured was in good health or that he would remain in good health for any period of time (Finding 19, R. 70); and that the payments were made for the purpose of continuing the certificate of insurance in force and that the insured was not suspended (Finding 17, R. 67); and that the insured was in good standing and the appellant's course of dealing constituted a waiver by the appellant to insist on prompt payment, and that the appellant was estopped to assert that said certificate was void or that the same was in full force and effect (Finding 20, R. 70-71).

These findings being supported by substantial evidence, the same will not be disturbed (Points and Authorities VII.).

CONCLUSION

In conclusion, it is submitted that the court's findings in favor of the appellant are amply supported by substantial evidence, and that the conclusions drawn therefrom are correct and the judgment in favor of the appellee should be affirmed.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,
Appellant,

vs.

HARRY E. KRUSSMAN, as Trustee of an Express Trust,
Appellee.

APPELLANT'S REPLY BRIEF

Upon appeal from the District Court of the United States for
the District of Idaho, Eastern
Division

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PAUL F. O'BRIEN,
CLERK

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APPELLANT'S REPLY BRIEF

A short reply brief is deemed advisable particularly for the purpose of suggesting wherein it is thought the argument of the appellee fails to answer the appellant's position and overlooks certain controlling facts and principles of law which must determine this case. It is further desired to consider some of the cases relied upon by the appellee and to point out why in this case the usual presumptions in support of the findings of the trial court does not prevail.

I.

It is to be observed from the appellee's brief that very little attention has been given to certain provisions of the

contract but, on the contrary, an attempt is seemingly made to avoid these contractual obligations by asserting waivers on the part of the appellant. These waivers are asserted, notwithstanding the fact that the appellant did precisely that which it was required to do under the contract and is now merely asserting the rights to which it, and the members of the Society, are entitled. It is thought proper to give brief consideration to the character of the contract and restate some of the controlling provisions and the law applicable thereto.

In considering this type of case it is necessary to understand that a member is both insurer and insured. The members of the Society prescribe the contract and make and amend the Constitution, Laws and By-Laws. These instruments which form part of the contract, do not contain "ex parte declarations" as is erroneously said in *Woodmen of World Life Insurance Society vs. Garner*, 140 S. W. (2nd) 414, quoted on page 26 of appellee's brief. Rather, they contain the contractual rights and requirements which the members themselves adopt.

A failure to recognize this point has lead some courts into error. There are approximately 350,000 members who have insurance in this society (R.182). These members have made the contract binding upon each other and upon the deceased and his beneficiaries in this case. The restrictive phases of this contract are for the mutual protection of all of the members. The contract is designed to give the maximum amount of benefit with reasonable expense and protection. Accordingly, the provisions of the automatic suspension for non-payment of monthly dues and reinstatement of the member upon pay-

ment within time if in good health, saves frequent necessity of re-applications, physical examinations and many other details which otherwise would be necessary and expensive. We most respectfully submit that we believe the trial court in the case at bar failed to give due consideration to the background of this contract and its terms.

The Supreme Court of South Carolina, in the case of *Perry vs. Sovereign Camp*, 174 S. E. 397, in reversing the trial court, said:

“Naturally he sympathized with the plaintiff in this action and his sympathy led him to lose sight of the fact that this fraternal order is made up of a great many thousands of persons whose insurance rights can only be protected and served by the enforcement by the Sovereign Camp of the Rules, By-Laws and Constitution of the Order, which the members themselves have adopted. The payment of claims which are forfeited by the laws of the Order reduces and endangers the security of the claims rightfully due under and protected by these laws. Claims are paid by assessments on the members. It is manifestly unfair to entail such assessments on members who have maintained themselves in good standing in favor of those who, through neglect or misfortune have failed to do so.”

The character of a contract of a fraternal association is further elucidated in *Sovereign Camp vs. Hart* (Ga.) 200 S.E. 296. Attention has heretofore been called to the fact that this contract and the method of its making has been given full statutory sanction in the State of Idaho by legislative enactment after the decision of the case of *Rasicot vs. Royal Neighbors*, 18 Ida. 85.

See: Chapter 23 of Title 40 of the Idaho Codes Annotated, 1932.

This code contains Sec. 40-2309, which, among other things, provides:

“Every Certificate issued by any such Society * * * shall provide that the Certificate * * * the Constitution and Laws of the Society and the Application for Membership * * * and all amendments to each thereof, shall constitute the agreement between the Society and the mmeber.”

It is ,therefore, a matter of determination in this case as to whether or not the terms of the contract will be enforced or various terms disregarded. We do not believe, under the evidence adduced, there is or can be any question of waiver by the corporate officers, for they did nothing that they were not required to do by the terms of the contract, and had no information whatever of the ill health of Mr. Krussman when delinquent payments were accepted, but necessarily relied upon his warranty of good health.

The Appellee, inhis Brief, argues that Mr. Krussman never became suspended as a member because, as we understand his argument, the payment of his monthly dues were made and received quite regularly in the month following the month within which they became due. To illustrate the fallacy of this position we beg leave again to refer to and quote briefly from some of the pertinent provisions of the contract and call attention to a few undisputed facts. The certificate, among other things, provides:

“If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the member, this Certificate shall become null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the member, or other act by any camp officer or members of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract.” (R.6).

Sec. 63 (a) provides that the monthly installments must be paid for the month in which they become due, and Sec. 63 (b) is as follows:

“Sec. 63 (b). If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such member and the Association shall thereby completely terminate.* * *” (Pls. Ex. 3).

This section was slightly amended at the 1939 convention, as appears on Page 6 of Appellant’s original brief.

Sec. 65 of the Constitution, Laws and By-Laws is of particular importance. The section in force in 1935, when Mr. Krussman became a member, was slightly amended in 1937 and also in 1939, and the full sections as amended in each instance are set out in full and at length in Pages 7, 8, and 9 of the Appellant’s original brief. Briefly, it is provided therein that any person who has become suspend because of non-payment of any installment of assessment, if in good health, may, within three calendar months after the date of his suspension, again become a member by paying the delinquent installments, and that the payment of such installments shall be for the

purpose of again making him a member, and shall be held to warrant that he is in good health and will remain in good health for at least thirty days thereafter, and said assessments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive, or imputed knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and retention of payment of such installments of assessments, in case such a person is not in good health, shall not make such person a member, or entitle him or his beneficiary or beneficiaries to any rights whatever.

Sec. 66 of the Constitution, Laws and By-Laws, quoted on Page 10 of Appellant's Brief provides that the retention by the Association of any installment paid by any member after he has become suspended, shall not constitute a waiver of any of the provisions of the Constitution, Laws and By-Laws, or any estoppel upon the Association and that any attempt by a suspended member to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time he again attempts to become a member, and for thirty days thereafter, and that the payment of any delinquent installment shall be a warranty that the person is and will remain for such period of time in good health, and that if the warranty is not true the Certificate shall be null and void.

It is conceded that Mr. Krussman was frequently delinquent in making his monthly payments but they were always

tendered within the time provided in the contract for reinstatement. The appellant accepted them for such purpose (R. 219-20) and for no other. It treated Mr. Krussman as suspended and reinstated a number of times. This is clearly proved by Defendant's Exhibit No. 18 (R.216) which was described at the trial as the membership card (R.216) kept by the Society, and the explanation of such card made by Mr. Pakes (R. 215-17). This card shows a number of suspensions and also a number of reinstatements. Mr. Pakes called attention to seven suspensions and seven reinstatements (R.216-17). There are some others shown on the card. This undisputed evidence proves Mr. Krussman was treated as suspended a number of times and reinstated upon payment of delinquent dues and is contrary to the courts findings "that the insured was not suspended" (R.56,67). Accordingly, not only do we have the contractual automatic suspension and reinstatement but the actual treatment of the member as such by the Society. Appellee's argument, and the courts finding, therefore, that "the Appellant always treated the insured in good standing and that the payments made by the insured were not for reinstatement" (App. Br. Page 16), is not only without support in fact but directly contrary to the undisputed evidence.

Appellee, in his brief, contends that the deceased commenced falling in arrears with his payments after September, 1936, and that Sec. 65 above referred to provided that for reinstatement the member must pay delinquent payments, including the installment for the current month. Appellee further contends that payment was made without including the amount for the current month and therefore, he contends, this shows "that appellant was accepting said payments for contin-

uing the certificate in force and not for reinstatement'' (App. Br. p. 17). This argument is contrary to the evidence. As above stated Defendant's Exhibit 18 and Mr. Pakes testimony shows positively suspension and reinstatement a number of times (R.216,-17). It is therefore apparent the Society did not construe this provision like appelle construes it. However, this provision of the Constitution was amended in 1937, becoming effective September 1st of that year, and by the amendment eliminated the provision requiring payment for the current month, so that thereafter the payment of delinquent installments was certainly all that was required for reinstatement, providing the warranty of good health was true. Accordingly, when, in July, 1938, Mr. Krussman suffered his first stroke, his contract was controlled by the amended By-Law.

In the face of the provisions of the contract above referred to, which have been restated in part, for the convenience of the Court, it is certainly apparent that the Society had no alternative but to accept these delinquent payments, but they were tenderd with a warranty and for reinstatement.

As is said in *White vs. Sovereign Camp*, 192 S. E. 161, on Page 166, wherein the Court discusses a similar question:

"The insurer, appellant herein, had the right to accept said dues—more than that, was compelled to accept said dues or assignmens, but was protected by the contract to the extent that the acceptance and retention by it of these dues was not a waiver of the condition that the insured was in good health and would remain in good health for a period of thirty days thereafter."

In other words, the Appellant did that which it was

required to do by its contract in the acceptance of said delinquent payments. It was a right given the member to make such payment and to now say that the acceptance thereof, under such circumstances, creates a waiver, does violence to the very terms of the contract and says that the Society is penalized for doing that which it was required to do and that the provision of the contract which provides that such acceptance will not constitute a waiver is meaningless. The well considered cases on this point cited in Appellant's original brief do not tolerate such construction.

But, appellee argues, Mr. Krussman was not given notice that his contract was forfeited and that the acceptance of these payments led him to believe that the contract was in full force and effect. This again does violence to the very terms of the contract. There is no notice required therein and the terms of the contract are to the contrary. A member is conclusively presumed to know the terms of this contract and the effect of each provision. The provisions are self-operative and automatic and no notice of forfeiture is necessary.

See such cases as:

Van Dahl vs. Sovereign Camp (Neb.) 264 N. W. 454;

Whitehorn vs. Royal Arcanum (Neb.) 269 N. W. 821;

Tatro vs. Modern Woodmen of America (Ill.) App. 2 N. E. (2) 107;

White vs. Sovereign Camp WOW (S.C.) 192 S.E. 161;

Whitlow vs. Sovereign Camp (Ia.) 202 N. W. 249;

Sovereign Camp vs. Moraida (Tex.) 113 S. W. (2) 177.

and numerous other cases cited under Points and Authorities on Pages 21 to 28 of Appellant's original brief.

These cases further definitely establish the point that when a member fails to make payments as provided he is automatically suspended and the acceptance by the Society of delinquent payments are for the sole purpose of reinstatement and for no other purpose.

The argument that Mr. Krussman was led to believe he was in good standing has no point, therefore, because his contract provided otherwise and he was conclusively presumed to know its terms.

The Appellee argues that Mr. Krussman received certain letters from the Society with refund checks and that these further led him to believe that he was in good standing. This argument is indulged in on pages 18 to 20 of Appellee's Brief. A complete answer to this argument is that those letters and checks which preceded Mr. Krussman's ill health are immaterial and of no consequence because Mr. Krussman was then in good health and subject to reinstatement and the one that was sent thereafter was sent without knowledge on the part of the Society that his warranty of good health made by the tender of delinquent payments was untrue. The sending of these letters and the refund checks are explained by Mr. Pakes in his deposition. This action was based upon the reports the

Society then had as to the payments made by Mr. Krussman, but without any information whatever as to his ill health. The very fact that they were sent indicate strongly that the Society had no knowledge of his condition of health, and obviously the appellee cannot properly contend that the Appellant, having been misled, should now be estopped when it learns the true facts.

Appellee argues, on pages 21 and 22 of his brief, that assuming for the purposes of argument that the question of reinstatement is involved, the question of Mr. Krussman's ill health was either known to the officers of the Society or "would be imputed to Appellant." There is no dispute but that Mr. Krussman was not in good health after July, 1938. As we understand Appellee's argument, it is to the effect that the Financial Secretary of the Pocatello lodge, who was dead at the time of the trial, must have known of the insured's illness and that it was his duty to report on the "standing of the members" and that while Mr. Pakes, Assistant Secretary, testified by deposition that he had no knowledge of Mr. Krussman's illness, and so far as he knew, no other officer did (R.208), yet, Appellee argues, it is quite probable that the Secretary or Auditors of the Society may have received knowledge and that the Assistant Secretary did not testify that he had made sufficient examination of the records or files to ascertain whether or not there was any letter or notice of ill health of the insured. This argument, we think, is without merit. The question of waiver was pleaded by Appellee (R.10-12) and the burden of proving the same necessarily rested upon him. It is fundamental that one relying upon a

waiver or an estoppel must prove the same. If Mr. Krussman had been suspended and his certificate become void for the non-payment of his dues, which Appellant most certainly contends was the case, then the burden rested upon the beneficiary to prove the reinstatement.

In the case of *Burke vs. John Hancock Mutual Life Insurance Company* (Mass.) 195 N. E. 507, it is held:

“Beneficiary had burden of proving reinstatement of lapsed life policy and truth of statements in Certificate of insurability which was a condition precedent to reinstatement.”

In *National Council of K. and L. of Security vs. Smiley*, (Fla.) 100 So. 153, it is held:

“The beneficiaries under a mutual benefit insurance policy brought suit to recover the face of the policy and damages. At the trial they introduced the policy and rested. The insurer offered its pleas, supported by testimony, to the effect that at the time of death the insured had been suspended from membership in the society for non-payment of dues as required by its Constitution and By-Laws. *Held* that this was a complete defense and shifted the burden to plaintiffs, the beneficiaries, of showing by competent, preponderating testimony that the insured was at the time of her death a member in good standing of the defendant society.”

There was no attempt made by the Appellee to show a reinstatement, notwithstanding the definite proof of automatic suspension by failure to make timely payments and the serious breach of warranty of good health. Notwithstanding

the fact that the burden rested upon the Appellee to prove reinstatement, which burden was not in any sense fulfilled, the Appellant proved that it had no such knowledge (R.208). Furthermore, it is to be noticed that some of the suspensions and reinstatements shown on Defendant's Exhibit 18 and stated by Mr. Pakes (R.217) occurred after Mr. Krussman became ill and certainly this could not have happened if the Society knew he was in ill health. This was proof of a negative so far as the Society was concerned. Such requires but slight proof even if we admit, for safe of argument, that we had this burden. *Douglas vs. Kenney* 40 Idaho 412, 423, 233 Pac. 874. The trial court does not find that the Society had actual knowledge of Mr. Krussman's ill health but that the Financial Secretary knew of it and that it is "presumed" he advised the appellant, and if not, such knowledge "would be imputed to the defendant." (R.69).

As appears from reference to Sec. 65, *supra*, and as argued in Appellant's original brief, there could be no "constructive or imputed knowledge." It must have been "actual knowledge" on the part of the Secretary. Whether or not the Financial Secretary had information of Mr. Krussman's ill health is immaterial. His requirement to report on "the standing of members" as stated in Appellee's brief, is no more than a report on the payments made by them.—not upon their condition of health. If he failed to make reports or reported erroneously, such would not constitute a waiver nor affect the contractual rights of the parties.

Sovereign Camp W. O .W. vs. Muller (Ga.) 11
S. E. 2nd, 92;

United Moderns vs. Pike (Mo.) 76 S. W. 774.

Furthermore, as heretofore suggested, any information gained by the Financial Secretary would be wholly immaterial and could not be considered a waiver. On the very face of the Certificate issued and as pleaded in Appellee's complaint, there appears the following:

"IMPORTANT. No camp or officer thereof, nor any officer, employee or agent of the Assoc. has authority to waive any of the conditions of this Beneficiary Certificate or of the Constitution and Laws of this Association." (R.7-8).

In addition to the foregoing, the Constitution provides precisely the same thing in Sec. 109 (g), to the effect that that:

"The Financial Secretary shall not, by acts, representations or waiver, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society, nor bind the Society by any such acts." (R.66).

The foregoing has statutory authorization in Idaho. See particularly Sec. 40-2331 I. C. A. 1932. Accordingly, therefore, there could be no imputation of knowledge of Mr. Krussman's ill health and not only did the Appellee fail to prove reinstatement, but the record shows no knowledge of ill health on the part of the Society and consequently no possibility of a waiver of this warranty or of reinstatement. See particularly

Sov. Camp W. O. W. vs. Cameron, (Tex.) 41 S. W. (2) 283;

Sovereign Camp W. O. W. vs. Moraida (Tex.) 113 S. W. (2) 177;

Salter vs. Security Benefit Assoc. (Kas.) 243 Pac. 1033;

Kiker vs. Sov. Camp W. O. W. (Ala.) 167 So. 313;

and other cases cited under Points and Authorities No. VI. of Appellant's original brief.

II.

In Appellant's original brief, some consideration was given to cases upon which it was anticipated Appellee would rely, and which cases were referred to in the opinion of the trial court (Appellant's Brief, pages 58 to 63). We desire to give some attention to a few additional cases cited in Appellee's brief, and upon which it seems considerable reliance is placed.

Appellee quotes from the case of *Steuernagel vs. Supreme Council of Royal Arcanum*, (N. Y.) 137 N. E. 320. In this case the member had been missing for a number of years, but his family had apparently kept up his dues. It appears that under such circumstances the By-Laws required a "prescribed notice" to be sent by registered mail to the last known address of the missing member, and that "no assessments nor dues shall thereafter be received from him or on his account." The notice was not sent and the dues were received by the Supreme Council. The By-Laws are entirely different from those considered

in the case at bar and the facts are so dissimilar that the case does not appear to be helpful to the Appellee.

In the case of *Harris vs. Sovereign Camp W. O. W.* (Ill.) 15 N. E. (2d) 793, cited by Appellee and from which appears a copious quotation, attention should be called to the fact that when this case arose Illinois did not have a statute similar to Sec. 40-2331 I. C. A. 1932, which, as heretofore stated, provides that a fraternal benefit society might provide in its Constitution, Laws and By-Laws that no local Camp or officer thereof might waive any provision of the Constitution, Laws and By-Laws. The absence of such statutory provision explains the *Harris* case. The existence of such a provision explains the *Moraida* case (Tex.) 113 S. W. (2d) 177.

Appellee cites and quotes from *Schrum vs. Sovereign Camp W. O. W.* (Mo.) 132 S. W. (2d) 1091, wherein past due installments had been accepted without current installments having been paid. It is to be observed, however, that the case arose before the amendment of Sec. 65, wherein the requirement of payment of current installments was eliminated. In the *Schrum* case the insured died on August 18, 1937. On September 1, 1937, the amended By-Law became effective, permitting the payment of past due installments without the necessity of payment of current installments, and providing that such may act as a reinstatement if the insured be in good health and remains so for thirty days. Accordingly, the amendment of this provision of the Constitution eliminates the *Schrum* case as an authority against the Appellant in the case at bar, for here Mr. Krussman's ill health did not commence until after the amendment of the said By-Law.

The Appellee gives considerable attention to the case of *Palmer vs. Sovereign Camp, W. O. W.* (S.C.) 15 S. E. (2d) 655. This case is cited by the Appellee principally to sustain the charge that the knowledge of the Financial Secretary was knowledge of the Appellant. A reading of the case discloses the fact that it is predicated largely upon the decision "in the *Wimberly Case*." The conclusion in the case that the knowledge of the Financial Secretary might, under some conditions, create a waiver or an estoppel is based upon Sec. 8072 on the South Carolina Code, 1932. This section is as follows.

"(8072). Who are agents of fraternal associations. When any fraternal insurance or beneficiary society, order or association of this or any other state, province or territory, now or hereafter operating within this state, and having lodges, councils, chapters, branches or subordinate or branch offices duly established and organized in this state, and when, under the laws, rules or regulations of such said society, order or association, members of the same are required to pay, or customarily and with the knowledge and consent of such said society, order or association, do pay premiums dues, assessments, fines, or other payments to any other member or person for the purpose of transmitting or delivering the same to the general office, or to any division, subordinate or branch office of such said society, order or association, then, such said member or person by whatever name or title known and called, so collecting such premiums, dues, assessments, fines and other payments, shall be deemed and considered the agents of such said fraternal insurance or beneficiary society, order or association."

Idaho does not have such a statute as the South Carolina Statute and under the laws and Constitution of the Society and

the fraternal code in Idaho, as pointed out in Appellant's original brief, the Financial Secretary is one of the very limited powers and does not have such power as would enable him to waive any provisions of the contract or to "impute" knowledge to any officer. The Palmer case can be more fully understood if consideration be given to the case of Wimberly vs. Sovereign Camp, 2 S. E. (2) 532, wherein the question of waiver was entirely predicated upon the existence of Sec. 8072 of the South Carolina Code. In this case Sec. 8047 of the South Carolina Code, which corresponds with Sec. 40-2331 of the Idaho Code, and Sec. 8072, which Idaho does not have, are considered, and it is pointed out in said opinion that because of the existence of this latter section enlarged powers are vested in the Financial Secretary, which would not have been the case without the enactment of such a statute.

The case of Satcher vs. W. O. W. Life Ins. Soc. (S.C.) 18 S. E. (2d) 523, also relied upon by the Appellee, is naturally and necessarily controlled by the Palmer case, and is subject to the same explanation. It is significant to note that earlier South Carolina cases, which were decided apparently before the enactment of said statute, are in effect, quite contrary to the Palmer case. See:

White vs. Sovereign Camp (S. C.) 192 S. E. 161;

Roberts vs. Sovereign Camp (S.C.) 164 S. E. 893;

Perry vs. Sovereign Camp (S. C.) 174 S. E. 397.

If South Carolina had but one section of statute, namely, Sec. 8047, which is the same as Sec. 40-2331 I. C. A. 1932,

and the same as Article 4846 of the Texas Statutes, considered in the case of *Sovereign Camp vs. Moraida*, 113 S. W. (2d) 177, the South Carolina Court would probably have concluded, as the Court did in the *Moraida* case, that:

“The legislature was not without power to grant fraternal benefit societies the authority conferred by Article 4846, and the exercise of such power cannot lawfully be thwarted by judicial decrees.”

It would extend this reply brief to undue length if each case were considered. A number of other cases relied upon by the Appellee are subject to similar distinctions and we most sincerely suggest these cases are either different in facts or controlling statutes or else the fundamental provision of the contract have either been overlooked or disregarded. As said by the Texas Court in the *Moraida* case:

“Apparently the effect of Article 4846 and the binding effect of the provisions of the Constitution, Laws and By-Laws of the Association adopted pursuant thereto, were overlooked and disregarded.”

III.

The Appellee argues that the findings of the trial court are supported by substantial evidence and that “the same will not be disturbed.” (P. 37 Appellee’s Brief). On page 13 of Appellee’s Brief there is quoted Sec. 11-219, Idaho Code Annotated, as an authority for the foregoing statement.

The Appellant contends (Specifications of Error 1 to X) that the findings of the trial court, attacked in said specifica-

tions, are in some instances erroneous conclusions of law, in other instances mixed questions of law and fact, and generally are not supported by substantial evidence, but contrary thereto. Under such circumstances these findings are not binding upon an appellate court.

It is held in *Foote Bros. Gear & Mach. Corp, vs. National Labor R. Board*, 114 Fed. 611, that:

“The determination of conclusions from the facts is not within exclusive function of fact finder, but is subject to rejection by the appellate court.”

Furthermore, it is to be observed from the record that substantially all of the testimony upon which the Appellee relies and urged in support of said finding was taken by depositions. These depositions brought into evidence the exhibits.

In *Cannon vs. Seyboldt*, 55 Ida. 796, 48 Pac. (2d) 406, it is held:

“Where evidence consists of depositions, Supreme Court is in as good a position as trial judge to find facts established thereby, and must examine such evidence and determine its value.”

On page 800 of the Idaho Report, the Court, with reference to the depositions says:

“We are in as good position as was the trial judge to find facts established solely by depositions, and it is our duty to examine such evidence and determine its value.”

As authority for this statement the Court cites thirteen Idaho cases.

In *Webb vs. Gem State Oil Company*, 56 Ida. 465, 55 Pac. (2d) 1302, on Page 1306 it is said:

“All the testimony in this case was produced at the hearing before the Industrial Accident Board and the depositions of the witnesses were presented to the trial judge. Since these depositions are before us we are in as good position as he was to find facts established by them, and it is our duty to examine the evidence and determine its value. *Cannon vs. Seyboldt*, 55 Ida. 796, 48 Pac. (2d) 406-407, and cases therein cited on this point.”

In *John Hancock Mutual Life Insurance Company vs. Girard*, 57 Ida. 198, 64 Pac. (2d) 254, on Page 255, the same rule is announced.

In the case of *Jaussaud vs. Samuels*, 58 Ida. 191, 71 Pac. (2) 426, on Page 431 it is said:

“In approaching this question, we are not unmindful of the rule that findings of fact made by a trial judge from conflicting testimony will not be disturbed on appeal if the testimony tending to support them would be sufficient to do so if uncontradicted. That rule, however, has no application in this case. The evidence on this point is nearly all documentary and the little which is not is undisputed. *Cannon vs. Seyboldt*, 55 Ida. 796, 48 Pac. (2) 406, and cases therein cited on this point.”

This is the rule announced by the Ninth Circuit Court of Appeals.

In *Rown vs. Brake Testing Equipment Corporation*, 38 Fed. (2) 220, on Page 223, it is said:

“All the testimony upon the issue having been taken out of the trial court, by deposition the presumption in support of findings based upon conflicting testimony in court does not prevail. *U. S. vs. Booth-Kelley El. Co.* (9 C. C. A.) 203 Fed. 423, 429; *Id.* 237 U. S. 481, 135 S. Ct. 659, 59 Law Ed. 1058.”

In *Paraffine Companies vs. McEverlast, Inc.* 84 Fed. (2) 335, on Page 339, the Ninth Circuit Court again says:

“The evidence presented by the defendant on this issue was all in the form of depositions. Hence, there is no presumption in favor of the trial court’s findings thereon.”

We have heretofore suggested that a number of the findings of the trial court are really conclusions of law or at best mixed qupestions of law and fact.

In *U. S. vs. Anderson*, 108 Fed. (2) 475, on Page 479, the Seventh Circuit Court of Appeals says:

“* * * Where the ultimate finding is a conclusion of law, or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court, *Bogardus vs. Commissioner*, 302 U. S. 34, 39, 58 S. Ct. 61, 82 L. Ed. 32.”

All of the foregoing authorities apply with considerable force in the case at bar. Under the facts as disclosed by the entire record, and particularly because of the exhibits and

depositions, the findings of the trial court are not entitled to the usual weight given to findings on appeal but the Appellate Court has the right to examine the evidence and determine the true facts and draw its conclusions therefrom. This, we most respectfully urge, must result in a reversal.

CONCLUSION

In conclusion it is most respectfully suggested that the Appellee has not answered the Points, Authorities and Argument urged in Appellant's Brief and that Appellants specifications of Error are, and each of them is, well taken, and the judgment of the trial court should be reversed and the case dismissed.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN, as Trustee of an Express Trust,
Appellee.

APPELLANT'S PETITION FOR RE-HEARING
and
BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

Upon appeal from the District Court of the United States for
the District of Idaho, Eastern
Division.

FILED

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IN THE
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a corporation,

Appellant.

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

PETITION FOR RE-HEARING

To the United States Circuit Court of Appeals for the Ninth Circuit, and the Judges thereof:

Comes now Omaha Woodmen Life Insurance Society, the appellant in the above entitled cause, and presents this its petition for a re-hearing of the above entitled cause, and in support thereof respectfully represents:

I.

That the Court erred in assuming as a basis for its decision that appellant had a duty to take some action which would disclose to the deceased Eric A. Krussman that his contract or certificate became suspended each time he failed to pay an installment of assessment on or before the last day of the month in which it became due.

II.

That the Court erred in sustaining the judgment of the District Court to the effect that appellant at all times treated the contract as continuing in force and by its conduct waived he right to forfeit the contract.

III.

That the Court erred in holding that the appellant waived the suspension or forfeiture in that it failed to take cognizance of the whole contract but only took cognizance of the provision providing for suspension, and particularly failed to consider Section 65 of the Constitution, Laws and By-laws, which provided that a member might become reinstated within three months from suspension by paying the delinquent installments, upon condition that the person be in good health at the time of payment and remain in good health for thirty days thereafter.

IV.

That the Court erred in holding that for nearly five years the deceased was led to believe that the delay in his payments was not fatal to his purpose in that by so doing the Court overlooked Section 65 of the Constitution, Laws and By-laws, which gave the deceased the legal right to pay his installments after the last day of the month but upon the condition that he be in good health at the time of payment and remain in good health for thirty days thereafter; and further overlooked an Idaho statute designated Section 40-2309 I. C. A. 1932 which provides that the Constitution, Laws and By-laws and

all amendments thereto shall constitute a part of the agreement between the Society and a member; and further overlooked the fact that members of a fraternal benefit society are conclusively presumed to know the terms of the Constitution, Laws and By-laws of the Society of which they are a member.

V.

That the Court erred in holding that the appellant waived the suspension by reason of having accepted payment made by check payable to appellant.

VI.

That the Court erred in that it failed to follow the law of Idaho governing fraternal benefit societies, (Chap. 23, Title 40, I. C. A. 1932, particularly Section 4-2309 and Section 40-2331) and in holding that the case was governed by *Rasiecott vs. Royal Neighbors of America*, 18 Ida. 85, 108 Pac. 1048, and in holding that the courts of Idaho would adopt the rule announced in the case of *Order of United Commercial Travelers vs. Campbell*, 115 Fed. (2) 733.

VII.

That the Court erred in that it failed to decide the case in accordance with the law of Idaho with regard to waiver.

VIII.

That the Court erred in that it failed to consider the complete contract between the parties and to enforce the provi-

sions thereof which necessarily would require a reversal of the judgment of the District Court.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for a re-hearing be granted and that judgment of the District Court of the United States for the District of Idaho, Eastern Division, be upon further consideration reversed.

Respectfully submitted,

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R. D. MERRILL

Residing at Pocatello, Idaho

RAINEY T. WELLS

Residing at Amaha, Nebraska

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I, counsel for the above named appellant, do hereby certify that the foregoing petition for re-hearing of this cause is well founded and presented in good faith and not for delay.

Attorneys for Appellant

A. L. MERRILL

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN,
as Trustee of an Express Trust,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

This brief will be confined to a discussion of the appellant's grounds for re-hearing, without further formal statement of points and authorities except those presented in connection with the discussion.

In order to properly present appellant's petition it is necessary to call attention to the fact that the appellant is a fraternal benefit society, and that the legislature of the State of Idaho in which the certificate involved was issued adopted a Code of Laws specifically governing such societies and exempting them from all other insurance laws. Under the terms of this Code of Laws, Section 40-2309 I. C. A. 1932,* the con-

*See Appendix

stitution, laws and by-laws of a fraternal benefit society constitutes a part of the agreement between the society and the member.

Section 63 of the Constitution, Laws and By-laws of the appellant at the time the member became suspended and thereafter, required every member of the Society to pay to the Financial Secretary of his local camp one installment of assessment and that if he did not pay such installment on or before the last day of the month in which it became due he thereby became suspended. Section 65 provided that a suspended member might again become a member or reinstate his membership by payment of his delinquent installments, if such payment be made within three months from the date of his suspension, but that by so doing he warranted that he was in good health at the time of such payment and would remain in good health for thirty days thereafter. Suspension upon failure to pay was automatic by Section 63, and reinstatement was automatic, subject to the condition of good health upon payment. It was further provided in Section 65 that all such payments made after the last day of the month should be received and retained by the Society without waiving any of the provisions of this section until such time as the Secretary of the Society should have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. By Section 66 (b) as well as Section 65 good health at the time of payment and for thirty days thereafter was a condition precedent to reinstatement. This section was unchanged thereafter except that in 1939 it was amended to provide that a person

might become reinstated within fifteen days from suspension simply by payment without regard to the condition of his health. Reference is here made to appellant's original brief and authorities therein referred to. All of said sections are quoted in said brief and are parts of Plaintiff's Exhibits 3, 4 and 5.

Under the terms of the certificate and the Constitution, Laws and By-laws of the Society suspension was automatic and self-executing upon failure to pay on or before the last day of the month. We particularly here refer to Point III of appellant's original brief and authorities thereunder and to the argument on pages 29 to 46 inclusive of said brief.

Where a suspension or forfeiture is self-executing, notice of such forfeiture or suspension is not required. In this connection it is stated under the subject of Mutual Benefit Insurance, 45 C. J. 102, Sec. 89, as follows:

"Payments due at stated times. If, by the laws of the society, dues and assessments accrue at stated intervals or fixed dates, the members are bound to take notice of that fact, and other notice is not necessary in the absence of a statute or law of the society requiring it."

It is further stated in 45 C. J. 120, Sec. 119 as follows:

"But where the laws of the society expressly dispense with notice, or provide that a member shall ipso facto stand suspended for failure to pay dues and assessments a defaulting member is not entitled to notice in order to work a forfeiture."

Certainly under Section 65 of the Constitution, Laws and By-laws, which was a part of the contract, the member had

the right to pay his installments after the last day of the month and become reinstated, subject only to the condition that he be in good health at the time of payment and remain in good health for thirty days thereafter; but his payment was a warranty that he was in good health just as effectively as if he had signed a written certificate to that effect. When the member pays his delinquent installments under Section 65 of the Constitution, Laws and By-laws the Society is legally obligated to accept such payments in accordance with Section 65 and the Society has the legal right to retain those installments until such time as knowledge is obtained that he was not in good health at the time of payment or did not remain in good health for thirty days thereafter. To hold that the Society by accepting payments after the last day of the month waives the forfeiture or creates a new contract with the member is to disregard the plain provisions of the contract itself. *Sov. Camp W. O. W. vs. Moraida (Tex.)* 113 SW (2) 177. *Van Dahl vs. Sovereign Camp (Neb.)* 264 N. W. 454.

We submit the holding of the Court that the Society at all times treated the contract as continuing in force and by its conduct waived the right to forfeit the contract is due to a misapprehension of the terms of the contract itself. The facts as shown by the record are that the Society only conformed to the provisions of the contract itself. It accepted payments made after the last day of the month exactly as required by Section 65. The record positively shows that the Society had no knowledge whatever that Eric A. Krussman was in ill health when any of the payments were made until that information was given to it after his death. It was therefore obliged to accept the payments. See: *White vs. Sovereign Camp*

W. O. W. (SC) 192 S. E. 161. It had no right to presume that he was in ill health, the presumption being that a person is in normal health.

Board of Health of Lyndhurst Tp. vs. United Cork Co. (N. J.) 172 Atl. 347;

Dallas et al vs. De Yoe (Cal.) 200 Pac. 361;

Murphy et al vs. Natl. Ice Cream Co. et al (Cal.) 300 Pac. 91.

It therefore follows that sending to Eric A. Krussman refunds on February 25, 1939, and February 1, 1940, was not a waiver of suspension or a course and custom which would lead him to believe that the suspension had been waived. On the other hand the Society did exactly what it had a right to do; it presumed Eric A. Krussman to be in good health when he paid the delinquent payments and accordingly made the same distribution to him as that to which he would have been entitled had he been in good health. It is significant to note from the record that when knowledge of ill health was obtained and a refund of assessments made, the amounts paid on these dates as refunds were deducted from the refund of assessments. Undoubtedly the Society had a right to presume that Eric A. Krussman was in good standing so long as he failed to notify the Society that he was not in good health at the time of such payments. He was a member of the Society and as such was both insured and insurer. He was presumed to know the by-laws and was required to suffer the consequences if he failed to abide by them. Again we refer the Court

to the points and authorities thereunder in appellant's original brief.

Apparently the Court decided this case on the theory that a provision was made for suspension but that the member was not given the specific right to pay his installments within three months from the date of suspension as provided in Section 65. It undoubtedly is true that if provision is made for a forfeiture and for reinstatement, and the member attempts to reinstate and is permitted to reinstate many times without complying with the provision for reinstatement, a waiver is indicated. That is not the case here. The member has done exactly what he had a right to do, and the Society has done exactly what it was compelled to do under the contract. We know of no statement which explains the situation better than the language of the Supreme Court of Tennessee in the case of *Lester vs. Sovereign Camp W. O. W.*, (Tenn.) 110 SW (2) 471, wherein the Court was considering a case under exactly the same circumstances, involving the same by-laws. The Court said:

“Under the foregoing provisions a suspended member, by paying the current and all past due installments within three months from the date of his suspension, is ipso facto reinstated, provided he is in good health and continues for thirty days. If he is not in good health, he is not reinstated by paying the current and past due installments.”

“Insured, in paying his installments on an average of twelve days after they became due, and at a time when, so far as the record shows, he was in good health, was strictly complying with the terms of his contract, and was not establishing a new agreement

by custom or course of dealing between the parties.”

“For the reasons set forth above we are of the opinion that the question of waiver and estoppel is not involved in this case. If, by its course of dealing, defendant had accepted from time to time such delinquent installments with knowledge that the insured was not in good health when they were paid, it could be plausibly argued that it had waived the forfeiture provision relating thereto. But it is not shown that the defendant ever accepted a delinquent installment with knowledge that the insured was in bad health at the time.”

To the same effect is *Pickens vs. Security Benefit Association* (Kans.) 231 Pac. 1016.

We are convinced that the Court's holding that for nearly five years the deceased was led to believe that the delay in his payments was not fatal to his purpose was erroneous. We do not know how better to explain the appellant's position on this proposition than by citing the opinion of the Court in the case of *Lester vs. Sovereign Camp* and in *Pickens vs. Security Benefit* just referred to. As explained in those opinions the deceased had the right to pay these installments after the last day of the month, and absent knowledge on the part of the Society that he was not in good health the Society was obligated to accept the payments. According to the record the Society refunded every installment paid after the last day of the month which was paid while the member was in ill health. This refund was made as soon as the Society obtained knowledge of the ill health.

Certainly, as stated in the *Pickens* case, a custom of paying after the last day of the month while a person is in good health

is not a custom which will compel a society to accept payments after the last day of the month while a person is in ill health. While it is true most of the payments were made by check payable to the Society itself, and the Society had knowledge of the dates of these payments, it was still necessary in order to create a waiver that the Society have knowledge of the ill health. Knowledge is an indispensable constituent of waiver. Without knowledge of ill health there could have been no waiver, and while it was held by the District Court that the Financial Secretary had knowledge of ill health and that it was imputed to the Society, there was no testimony in the record to justify such a holding. The Financial Secretary was not a witness; he was deceased before this case was tried. Furthermore, it was provided in Section 40-2331 I. C. A. 1932:

“Constitution, Laws and By-laws may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and all beneficiaries of members,”

and pursuant to such section the Society adopted Section 109 (g) of the 1937 Constitution, Laws and By-laws, which became 107 (g) of the 1939 Constitution, Laws and By-laws, whereby it was provided that:

“The Financial Secretary shall not by acts, representations or waivers, nor shall the camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the constitution, laws and by-laws of the Society, nor to bind the Society by any such acts.”

It is therefore apparent that under this statute the knowledge of the Financial Secretary, if any, was not imputed to the Society. In this connection see *Sov. Camp W. O. W. vs. Moraida* (Tex.) 113 SW (2) 177, and other cases cited under Point II of appellant's original brief and the argument on pages 46 to 57 inclusive of said brief.

In the Court's opinion it is stated that it is apparent that if the provisions of the contract are strictly applied recovery is prohibited. The case of *Rasicott vs. Royal Neighbors* is then considered. Although the facts in this case are admittedly not in point, the Court adopts the view that the opinion points the path which it should follow in deciding this case. It is contended by the appellant that the Court was mistaken in this conclusion. Upon a reading of the opinion in this case it appears that the subject of the decision and the law under which it was decided are so different that it should not be held to establish the rule to be followed here. The Court in the *Rasicott* case had under consideration a contract where, under the facts as stated by the Court, the local camp of which the insured was a member was charged with the duty of looking after the health and conduct of its members and of expelling or suspending its members for any violation of the laws of the order or breach of their duties as members of the Society. Those facts do not exist in the present case. Neither the Financial Secretary nor the camp was charged with the duties enumerated. Furthermore, the decision of the *Rasicott* case was made in 1910, prior to the adoption of the fraternal Code heretofore referred to. Clearly at the time of the decision the only rules which the Court had to follow were the rules of equity. In that opinion the Court stated that the State was vitally

interested in the thrift and frugality of its citizens and stated in effect that it decided the case on equitable principles for the best interest of the public at large, which is termed public policy.

It is undisputed that the State is vitally interested in members of fraternal benefit societies. This could be no more strongly indicated than by the legislature of the State of Idaho adopting a Code of Laws for the government of such societies and the rights under their contracts. This statute having been enacted establishes the public policy of the State of Idaho with respect to fraternal benefit societies and their members which cannot be superseded by court decisions. The legislature by Section 40-2304 I. C. A. 1932 provided that such societies should be governed by the Fraternal Code, being Sections 40-2301 to 40-2407 I.C.A.1932. By Section 40-2309 I.C.A. 1932 the legislature provided that the Constitution, Laws and By-laws of such societies should form a part of their contracts. It did not provide that such portions of the constitution, laws and by-laws as were not declared void by a court should constitute a part of the contract. The legislature undoubtedly recognized the character of such societies, having in mind that the member was both the insured and the insurer. It will be noted in Section 40-2301 I. C. A. 1932 that such societies are voluntary associations, have no capital stock, and are organized and carried on solely for the mutual benefit of its members and their beneficiaries and not for profit, having a lodge system, with a ritualistic form of work and a representative form of government.*

*See Sections quoted in Appendix.

Undoubtedly the legislature had in mind that the same laws which apply to commercial insurance should not apply to fraternal societies. It undoubtedly had in mind when enacting these statutes the fact that the members themselves through their own representatives govern themselves and enact the provisions of their constitution, laws and by-laws. Having this in mind it cannot be successfully contended that a member is a stranger to the society and the constitution, laws and by-laws. On the other hand it must be conclusively presumed that the member is familiar with the provisions of the constitution, laws and by-laws.

When the Rasicott case was decided, this Code of Laws was not in effect, and the Court had no guide to follow except that of general public policy, and undoubtedly was justified in rendering the decision it did. We are constrained to believe, however, that if the Supreme Court of Idaho were to pass upon this question at this time it would not attempt to supersede the statutes enacted by the legislature for government and control of fraternal benefit societies.

In connection with public policy, we feel certain that the public policy of Idaho is in accord with the general rule, and we will herein refer to some of the authorities with reference to public policy. The following statement is taken from 6 R. C. L. 109, Sec. 108, under the subject of Constitutional Law:

“It is generally recognized that the public policy of a state is to be found in its constitution and statutes, and only in the absence of any declaration in these instruments may it be determined from judicial decisions. In order to ascertain the public policy of a state

in respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned. All questions of policy are for the determination of the legislature, and not for the courts, and there is no public policy which prohibits the legislature from doing anything which the constitution does not prohibit. Hence the courts are not at liberty to declare a law void as in violation of public policy. In accordance with these general principles, it has been said that if a state constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state. Where courts intrude into their decrees their opinion on questions of public policy they in effect constitute the judicial tribunals as law-making bodies in usurpation of the powers of the legislature."

See also 6 R. C. L. 110, Sec. 109.

In 12 Am. Jur. 668, Sec. 171, we find the following:

"Where there are constitutional or statutory provisions, they govern as to what is public policy. Where the lawmaking power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

In the same section it is further stated:

"Primarily it is the prerogative of the legislature to declare what agreements and what acts are contrary to public policy and to forbid them."

And it is further therein stated:

"Some of the courts, speaking upon this subject,

have said that the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, since they are most familiar with the habits and fashions of the day and with the actual condition of commerce and trade—their consequent wants and weaknesses—and that legislation is least objectionable, because it operates prospectively, as a guide in future negotiations, and does not, like a judgment of a court, annul an agreement already concluded. Courts have no right to ignore or set aside a public policy established by the legislature. Therefore, it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state as manifested by the legislation or fundamental law of the state. Courts cannot declare agreements or acts authorized by statute to be contrary to public policy.”

In 11 Am. Jur. 814, Sec. 139, we find the following:

“In order to ascertain public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned.”

On page 816 of the same volume and section we find the following:

“Not only is there no public policy which prohibits the legislature from doing anything which the constitution does not prohibit, but a statute is conclusive as to public policy of the state unless it contravenes constitutional provisions. Hence, the courts are not at liberty to declare a law void as in violation of public policy.”

Applying these authorities which we believe represent the

rule in Idaho as well as the general rule, the conclusion that the legislature of Idaho has delegated to fraternal benefit societies the power to make their constitutions, laws and by-laws a part of their contract and enforce the same cannot be escaped.

In the Court's opinion the following is quoted from the opinion of *Order of United Commercial Travelers vs. Campbell*, 115 Fed. (2) 743:

“It is the rule that the existence of a waiver depends upon the effect of the insurer's action upon the insured, not upon what the insurer intends.”

We submit the rule quoted is not the law of Idaho. We have discovered no reason to believe the rule in Idaho as to waiver is different from the general rule. Waiver is defined in 67 C. J. 289, Sec. 1, as follows:

“ ‘Waiver’ has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it.”

We further find in 67 C. J. 298, Sec. 2 the following:

“Waiver is a voluntary act or a voluntary refraining from action. A waiver always contemplates that

a party has in the knowledge of his rights voluntarily surrendered them.”

In 67 C. J. 299, Sec. 5, we find:

“Inasmuch as the intentional relinquishment of the rights, benefit, or advantage in question is generally an essential element of waiver, such relinquishment necessarily involves knowledge; thus, waiver involves or is based upon knowledge as an essential element.”

In 67 C. J. 302, Sec. 6, we find:

“A waiver must be intentional; it must be an intentional act with knowledge.”

In support of this statement among other authorities under Note 43 is cited the case of Grimm Alfalfa Seed Growers vs. Stroschein, 42 Ida. 12, 242 Pac. 444. While this case does not involve similar facts to those in the instant case, it is apparent from reading this opinion that the Supreme Court of Idaho held that there can be no waiver without an intention on the part of the person charged with waiver to relinquish his right. In the opinion of this case reference was made to the case of Hawkins vs. Smith, 35 Ida. 349, 205 Pac. 188, and the following quoted therefrom:

“To constitute a waiver within the definition already given, it is essential that there be an existing right, benefit, or advantage, knowledge, actual or constructive, or its existence, and an intention to relinquish it.”

To the same effect are Garrett vs. Neitzel, 48 Idaho 727,

285 Pac. 473, Independent Gas and Oil Co. vs. T. B. Smith Co., 51 Idaho 710, 10 Pac. (2) 317, and Hopkins vs. Hensley et al, 53 Idaho 120, 22 Pac. (2) 138.

We therefore respectfully submit that the law of Idaho is not, as held in the case of Order of United Commercial Travelers vs. Campbell, that it depends upon the effect of the insurer's action upon insured and not what the insurer intends. But on the other hand, the Supreme Court of Idaho has plainly and without doubt stated that the existence of a waiver depends upon the intention of the party charged with waiver. Furthermore the Supreme Court of Idaho has held that knowledge is an undisputed element of waiver.

The facts under consideration show that the Society had no knowledge of ill health of Eric A. Krussman when payments were made after the last day of the month, that it had no intention to do other than to accept the payments after the last day of the month for the purpose of reinstatement in accordance with the contract. Under the rules as to waiver established by the Supreme Court of Idaho there could be no waiver.

The contract under consideration has full statutory approval. The force of these statutes establish the public policy of the state of Idaho. As stated in *Sovereign Camp vs. Moraida*, 113 S. W. (2) 177, on page 180:

“The legislature was not without power to grant fraternal benefit societies the authority conferred by Article 4846 (40-2331 I. C. A. 1932), and the exercise of such power cannot lawfully be thwarted by judicial decree.”

It does not seem logical to argue that while the Society was required to accept these payments under the terms of its contract, yet the member could disregard his warranty of good health and urge a waiver on the part of the Society for doing that which it was required to do. Neither does it appear logical to suggest that the Rasicot case marked the path to follow when a subsequent Idaho legislature determined another course.

CONCLUSION

In conclusion, therefore, we most respectfully urge that the appellant's petition for re-hearing be granted and that judgment of the District Court for the District of Idaho, Eastern Division, be upon further consideration reversed.

Respectfully submitted,

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Service of foregoing Petition for Re-hearing and Brief in support of Petition for Re-hearing acknowledged this 17th day of November, 1942.

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APPENDIX

The following sections are quoted from Title 40 of Idaho Code Annotated, 1932.

Section "40-2301. Fraternal benefit societies defined.—Any corporation, society, order or voluntary association without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative for of government, and which shall make provision for the payment of benefits in accordance with section 40-2305, and any mutual life association whose membership is limited to a secret fraternity, profession or guild and which elects its officers and directors by direct vote of its members, either in person or by proxy, is hereby declared to be a fraternal benefit society."

Section "40-2304. Exemptions.—Except as herein provided such societies shall be governed by this chapter and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

Section "40-2309. Certificates.—Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and

conditions thereof, and any changes, additions or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership."

Section 40-2320. Constitution and by-laws.— Every society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to or amend such constitution and by-laws, and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society."

Section "40-2331. By-laws may not be waived.— The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONSOLIDATED ROYALTIES, INC., a corporation,
and C. B. CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of Deep
Hole Drilling Corporation, a corporation,
Bankrupt, HOWARD SUPPLY COMPANY,
a corporation, I. RUDE, FRED LUNDBERG,
J. C. HAYWARD, and STANDARD OIL
COMPANY OF CALIFORNIA, a corporation,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

No. 10088

United States
Circuit Court of Appeals

For the Ninth Circuit.

CONSOLIDATED ROYALTIES, INC., a corporation,
and C. B. CALLAHAN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
Southern District of California
Central Division

#34928-C

In the Matter of
DEEP HOLE DRILLING CORPORATION,
Bankrupt.

#34929-C

In the Matter of
KOVELL OIL COMPANY,
Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE
AND FOR RESTRAINING ORDER

To the Honorable Samuel W. McNabb, Referee in
Bankruptcy in the Above Matters:

The petition of Harry Ashton respectfully shows:

That each of the bankrupts herein did, on or about the 23rd day of September, 1939, file a petition under Provisions of Chapter 11 of the National Bankruptcy Act; that on or about said date, the petitioner was appointed receiver in each of said matters under the provisions of Chapter 11 of the National Bankruptcy Act; that thereafter, and on or about April 22, 1940, by orders duly made herein, each of said bankrupts was adjudged a bankrupt and the petitioner was appointed trustee of the estates of each of said bankrupts, and is now the duly appointed, qualified and acting trustee in

each of said matters, and of all the assets of each of said matters;

That among the assets of said Deep Hole Drilling Corporation is a certain oil well commonly known as Deep Hole Well #1, located at Torrance, California, on property described as follows, to-wit:

East 2 acres of the East 5 acres of the North 350.08 feet of Lot 50, Tract 15, Los Angeles County. [2]

That among the assets of the Kovell Oil Co. are certain oil wells respectively described as follows, to-wit:

Kovell #1, situated on Lot 105, Tract 639, Torrance, Field California, Kovell #2, situated on Lot 41, Tract 588, Torrance Field, California, Kovell #3, situated on Lot 63, Tract 588, Torrance Field, California, Kovell #4, situated on Lot 36, Tract 588, Torrance Field, California.

That the production from said wells has been sold, and is now being sold, to the Standard Oil Company of California, and to the Union Oil Company of California; that certain moneys, the extent of which is unknown to the petitioner, by proceeds from sale of said production, are now being held by said purchasers; that the following persons, to-wit: I. Rude, Howard Supply Company, a corporation, Consolidated Royalties, Inc., C. B. Callahan, Fred Lundberg, and J. C. Hayward, claim to have some

right, title or interest in or to the production and the proceeds from such production, from said oil wells, and in and to the proceeds of said production which is now being held by the Standard Oil Company of California and the said Union Oil Company of California, each of which companies refuses to turn over the proceeds of said production to the petitioner;

That your petitioner further alleges that at all times there have been creditors with claims provable in said estates with claims arising from the drilling operation and maintenance of said oil wells, and each of them, and that there are not assets of sufficient value with which to pay the claims of trade creditors of either of said estates.

In the event that any of the persons named herein asserts he is the holder of any executory contract created by either of said bankrupts, the trustee prays for authority to disaffirm said contracts and each of them; [3]

That partial hearings were had in respect to some of the foregoing matters but same were discontinued by reason of the tentative approval of plan of arrangements submitted in each of said estates;

That the said C. B. Callahan and Consolidated Royalties, Inc., threatened to sue the said Standard Oil Company of California for portions of proceeds from production held by that company, the institution and prosecution of which suit will act to the detriment of the trustee and to the estates gener-

ally; that all matters involved in any such litigation may properly be presented before this court.

Wherefore, petitioner prays that an order be made directed to each of the persons above named requiring each of said persons to be and appear before this court at a time and place fixed in said order to show cause, if any there be, why a further order should not be made directing the said Standard Oil Company of California and Union Oil Company of California, to turn over to the petitioner the proceeds of all production heretofore shipped and which may be shipped to said companies for which previous payment has not been made, and adjudging and decreeing that none of the other persons above named has any right, title or interest in or to the production from any of said wells or in or to the proceeds of any of said production, and fixing and classifying the rights of said persons in respect to the rights of general creditors and for such other and further relief as may be proper.

Your petitioner further prays that an order be made forthwith restraining the said C. B. Callahan and Consolidated Royalties, Inc., from instituting or causing to be instituted any action or proceeding in any court other than in this [4] bankruptcy

court in respect to the proceeds from the production of any of said wells.

HARRY ASHTON

Petitioner and Trustee.

GEORGE T. GOGGIN & RUSSELL B. SEYMOUR,

By RUSSELL B. SEYMOUR

Attorneys for Petitioner.

(Verified)

[Endorsed]: Filed May 17, 1940. Samuel W. McNabb, Referee. Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [5]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND
RESTRAINING ORDER

On the reading and filing of the duly verified petition of Harry Ashton, trustee in each of the above matters, and on motion of George T. Goggin and Russell B. Seymour, attorneys for said trustee, no adverse interests appearing thereat,

It is ordered that I. Rude, Howard Supply Company, a corporation, Consolidated Royalties, Inc., C. B. Callahan, Fred Lundberg, J. C. Hayward, Standard Oil Company of California, and Union Oil Company of California, and each of them, be and appear before this court, Federal Building, Los Angeles, Calif., on the 27 day of May, 1940, at

3 P.M. to then and there show cause, if any there be, why the relief prayed for by said trustee should not be granted; and

It is further ordered that, pending further order of the court, each of the respondents above named be and hereby is, restrained from initiating any proceedings or action, or further conducting any present proceeding or action, in respect to any interest in the property described in said trustee's petition, or the production, or the proceeds of production from said property. [6]

It is further ordered that service herein shall be deemed complete if a certified copy of this order and a true copy of said petition be served upon each of said persons or upon the attorney of record herein of said persons, respectively, on or before five days prior to the time fixed for said hearing, and said service may be made by any male citizen of the United States over the age of 21 years, not a party to this proceeding.

Dated this 17 day of May, 1940.

SAMUEL W. McNABB

Referee in Bankruptcy.

[Endorsed]: Filed May 17, 1940. Samuel W. McNabb, Referee. Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [7]

In the District Court of the United States
for the Southern District of California
Central Division

No. 34928-C

In Proceedings for an Arrangement

In the Matter of

DEEP HOLE DRILLING CORPORATION, a
California corporation,

Debtor.

ANSWER OF RESPONDENTS, CONSOLI-
DATED ROYALTIES, INC., A CORPORA-
TION, AND C. B. CALLAHAN TO ORDER
TO SHOW CAUSE AND PETITION UPON
WHICH IT IS BASED.

Come now Consolidated Royalties, Inc., a corpo-
ration, for itself, and C. B. Callahan for himself,
and not for any other respondent, and expressly re-
serving their objections to the jurisdiction of this
Honorable Bankruptcy Court to summarily deter-
mine this matter, and in answer to the Order to
Show Cause issued by the Honorable Samuel W.
McNabb, Referee in Bankruptcy in the above en-
titled matter, under date of May 17, 1940, return-
able May 27, 1940, and directed to the said answer-
ing respondents, said respondents respectfully al-
lege as follows:

I.

That under date of September 30, 1938, Henry C. Hopkins and Clarence V. Hopkins, as lessors, entered into an oil and gas lease with Twin Oil Company, a corporation, as lessee, which lease in part covered the following described property, situate in the County of Los Angeles, State of California, to wit:

The East 2 acres of the East 5 acres of the North 350.08 feet of Lot 50, Tract 15, as per map recorded in Book 12, Page 189 of Maps, in the office of the County Recorder of Los Angeles County, California;

that said lease provided that the term thereof was for a definite [8] number of years and so long thereafter as oil and/or gas should be produced therefrom in paying quantities; that thereafter the lessee's interest under said oil lease was assigned to the Deep Hole Drilling Corporation, Debtor, which assignment was recorded on December 10, 1938, in Book 16207, Page 354, of Official Records, in the office of the County Recorder of Los Angeles County, California;

II.

That said Deep Hole Drilling Corporation drilled and completed its No. 1 well on the above described property, which well was placed on production on February 5, 1939;

III.

That pursuant to an application filed therefor, by the said Deep Hole Drilling Corporation, the

Department of Investments of the State of California, through the Commissioner of Corporations of said State, issued on March 25, 1939, a permit to said Deep Hole Drilling Corporation to sell and issue to these answering respondents an aggregate of not to exceed to either or both of them, twelve 1% participating royalty interests, without maintenance charge, of all oil, gas and other hydro-carbon substances produced and saved from the well designated as well No. 1, at and for the price of \$950.00 for each 1% interest;

IV.

That attached to the application for said permit was the form of conveyance of said royalty interests proposed to be used; that said permit further provided that the said Deep Hole Drilling Corporation should execute said conveyance in the form so filed with the application;

V.

That pursuant to the authority granted by the aforesaid permit, Deep Hole Drilling Corporation did, on March 27, 1939, sell, assign, transfer and set over to Consolidated Royalties, Inc., a corporation, an overriding royalty interest of 5%, and to C. B. [9] Callahan an overriding royalty interest of 7% of the oil produced, saved and sold, and an equal amount of the net proceeds received by the operator from the sale of all gas, casinghead gas and all gasoline produced, saved and sold from the real

property hereinabove described, from and including March 1, 1939, subject to the terms of the lease, but providing that said interest should not be chargeable with any operating costs of the well or lease and further provided said Deep Hole Drilling Corporation should execute and deliver to the purchaser of such oil, gas or other hydro-carbon substances division orders necessary or required to enable these respondents to receive direct from such purchasers the moneys due; that a true and correct copy of the form of the conveyance of said 5% interest to Consolidated Royalties, Inc., is attached hereto, marked Exhibit "A"; that the form of conveyance of said 7% interest to C. B. Callahan is identical, with the exception of the amount of 7% so conveyed:

That as consideration for the said conveyance, Consolidated Royalties, Inc. paid to Deep Hole Drilling Corporation the sum of \$4,750.00 cash, lawful money of the United States, and C. B. Callahan paid to said Deep Hole Drilling Corporation the sum of \$6,650.00, lawful money of the United States, being \$950.00 for each 1% royalty interest so conveyed, as authorized by said permit, to the respective respondents;

VI.

That ever since March 27, 1939, Consolidated Royalties, Inc. and C. B. Callahan have been and now are the owners and holders of said 12% interest so conveyed to them and these answering respond-

ents caused said conveyances to be recorded in the office of the County Recorder of Los Angeles County, California, on March 30, 1939; That at the time of said conveyance the said Deep Hole Drilling Corporation was solvent and there were only approximately \$4,000.00 in unpaid obligations owing by said Deep Hole Drilling Corporation, with the exception of the claim of Howard Supply Company herein referred to; [10] that as part of the application to the Corporation Commissioner of the State of California, in connection with said conveyances, and as one of the moving considerations to these answering respondents for obtaining said conveyances, the Howard Supply Company executed and delivered to said Corporation Commissioner an agreement, which, by its terms, provided that said corporation, as a creditor of the Deep Hole Drilling Corporation, would not in any wise interfere with the payment of royalties from the above described real property, as a creditor or otherwise;

VII.

That prior to March 27, 1939, Deep Hole Drilling Corporation entered into a contract with the Standard Oil Company of California for the purchase of the oil to be produced from said Deep Hole Well No. 1, and said Standard Oil Company has been taking the said oil production from said well under said agreement, and still is so purchasing the same;

That on March 29, 1939, Deep Hole Drilling Corporation executed and delivered to Standard Oil Company of California a division order directing said purchaser to pay 12% of the proceeds of said oil from Deep Hole Well No. 1 to respondent Consolidated Royalties, Inc., which order was, by its terms effective as of March 1, 1939, and was irrevocable; that a true and correct copy of said division order, which was consented to by respondent C. B. Callahan, is attached hereto and marked Exhibit "B", and is by this reference made a part hereof; that said division order was accepted by said Standard Oil Company of California; that said corporation at all times thereafter paid to said Consolidated Royalties, Inc., said 12% of the proceeds of the sale of said oil, through the month of August, 1939, but has made no payment thereof since September 1, 1939; that respondents are informed and believe and upon such information and belief allege, that there is now due, owing and unpaid on the books of the Standard Oil Company of California for the benefit of [11] respondents, being 12% of the oil runs from September 1, 1939, through April 30, 1940, the total sum of \$846.08;

That insofar as the 7% royalty interest of C. B. Callahan is concerned, Consolidated Royalties, Inc. is acting as his agent for the purpose of collecting said royalty and has no right, title or interest therein or thereto;

VIII.

That on May 15, 1940, these answering respondents filed an action in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, to recover said sum of \$846.08;

IX.

That subsequent to the acquisition by these answering respondents of said 12% interest, the Deep Hole Drilling Corporation entered into the drilling of other wells on property other than that hereinabove described; that these respondents have no interest whatsoever in these said wells, or in or to the production therein or therefrom; that the obligations incurred with the drilling of said additional wells on other properties resulted in the filing of the petition of the Deep Hole Drilling Corporation and its subsequent adjudication as a bankrupt on or about April 22, 1940;

That these respondents did not at any time nor have they ever participated in the conduct, management or business of Deep Hole Drilling Corporation in the drilling of the wells, or in any other manner, nor did these respondents, by said conveyances, obtain the right to in any manner control the management or business and operations of Deep Hole Drilling Corporation, and these respondents further allege that none of the creditors of the bankrupt corporation delivered materials to said bankrupt upon these respondents' personal credit and these respondents further allege that the bankrupt was

extended credit by creditors in the drilling of subsequent wells by the bankrupt and that said credit was so extended with the notice and knowledge of conveyances to these answering respondents of said [12] interest in the oil to be produced, saved and sold from well No. 1, and respondents further allege that any and all credit and/or materials and/or labor which was furnished to the bankrupt subsequent to said conveyances was done by the creditors voluntarily and that said creditors did not at any time rely upon the fact that said 12% interest did or did not belong to the bankrupt in so extending such credit or in furnishing labor and/or materials to the bankrupt;

X.

Respondents allege that under the rule of property, as established by the highest Courts of the State of California, in the recent case of *Payne vs. Callahan*, reported in Volume 100, Cal. App., Decisions, p. 766, a hearing upon which case was denied by the Supreme Court, respondents acquired by the purchase of said 12% interest an overriding royalty by which Deep Hole Drilling Corporation conveyed to respondents 12% of its profit a prendre, which is an interest in real property and that thereupon these respondents became cotenants and solely cotenants, and not otherwise, with the lessee in and to said profit a prendre; that from and after the conveyance thereof to respondents the Deep Hole Drilling Corporation had no further right, title

and/or interest in and to said 12% interest which it could sell or dispose of, nor did the said Deep Hole Drilling Corporation have any interest therein or thereto which would be subject to any judicial writ or process; therefore said 12% interest is not a part or portion of the bankrupt's estate and as the creditors had, in many instances, actual notice, and in others, constructive notice of the outright conveyance of said 12% royalty interest to respondents prior to their extending any credit whatsoever to the bankrupt for the construction of additional wells to said well No. 1, neither said creditors nor the trustee are entitled to the moneys held on the books of the Standard Oil Company of California for the benefit of these answering respondents, nor in or to 12% of any oil which may hereafter be produced from said well No. 1; [13]

XI.

That it would be inequitable, unjust and unfair under the circumstances to enter an order herein subjecting the property of these answering respondents to the claims of creditors of the bankrupt, thereby including the same as a part of the bankrupt's estate, particularly with respect to any and all claims which have arisen through the drilling of subsequent wells subsequently to the completion of said well No. 1, and the conveyance of said 12% interest to said respondents, and particularly as to any and all claims of the Howard Supply Company;

XII.

These respondents further allege that the entering of an order in these summary proceedings for the taking of respondents' property for the benefit of the bankrupt's estate and the creditors thereof, would take such property without due process of law, and the entering of such an order in these proceedings would confiscate the property of these respondents for the benefit of said bankrupt's estate and said creditors in direct violation of the provisions of the Constitution of the United States and the property rights of these respondents protected thereby, particularly the Fifth Amendment and the Fourteenth Amendment thereto, contrary to the laws of property as established by the highest Courts of the State of California;

Wherefore, respondents pray that the Order to Show Cause herein be dismissed and that the relief prayed for be denied insofar as the same attempts to affect in any manner whatsoever the property rights of these respondents in and to said 12% of the oil and gas produced, saved and sold from Deep Hole Drilling Corporation's well No. 1, and for such other and further order as this Court shall deem meet, just and equitable in the premises and necessary to protect the right, title and interest of these respondents in and to their said property.

FLEMING & ROBBINS,

By C. S. TINSMAN,

Attorneys for Respondents,
Consolidated Royalties, Inc., a
corporation, and C. B. Callahan.

State of California,
County of Los Angeles—ss.

E. W. Clark, being by me first duly sworn, deposes and says:

That Consolidated Royalties, Inc., is a corporation and that affiant is an officer thereof, to-wit, the Treasurer, and as such officer makes this verification for and on behalf of said corporation, one of the respondents in the above entitled action; that he has read the foregoing Answer of Respondents, Consolidated Royalties, Inc., a Corporation, and C. B. Callahan to Order to Show Cause and Petition Upon Which It Is Based and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

E. W. CLARK.

Subscribed and sworn to before me this 21st day of May, 1940.

(Seal) MARIE TREAIS,
Notary Public in and for the County of Los Angeles, State of California. [15]

EXHIBIT "A"

ASSIGNMENT OF ROYALTY INTEREST OVERRIDING

Know All Men by These Presents, that

Whereas, Deep Hole Drilling Corporation, a corporation, is the owner and holder, by assignment,

of that certain Oil and Gas Lease dated September 30, 1938, by and between Henry C. Hopkins and Clarence V. Hopkins, as lessors, and Twin Oil Co., a California corporation, as lessee, insofar as the same pertains to the following described real property located in Los Angeles County, California, to-wit:

The East two (2) acres of the North 350.08 feet of Lot Fifty (50), Tract No. 15, in the County of Los Angeles, State of California, as per map recorded in Book 12, page 189 of Maps, in the office of the County Recorder of said County.

Except any portion of the above described property within the lines of Beacon Street, as shown on map of Tract No. 437, recorded in Book 14, page 162 of said Map records;

which said Assignment of Oil and Gas Lease was recorded on December 10, 1938, in Book 16207, page 354, Official Records of Los Angeles County, California; and

Whereas, said Deep Hole Drilling Corporation has completed a well upon said above described premises, known as Deep Hole Drilling Corporation Well No. 1.

Now, therefore, for and in consideration of the sum of Ten (\$10.00) Dollars, and other good and valuable consideration, receipt of which is hereby acknowledged, Deep Hole Drilling Corporation, a corporation, does hereby sell, assign, transfer and

set over unto Consolidated Royalties, Inc., a corporation, an overriding royalty interest of five (5%)—per cent. of the oil produced, saved and sold, and five (5%)—per cent. of the net proceeds received by the operator from the sale of all gas, [16] casinghead gas, and all gasoline produced, saved and sold from the above described premises, from and including March 1st, 1939, subject to all the terms, covenants and conditions of said above mentioned lease. Said royalty interest shall not be chargeable with any operating cost of the well or lease, and shall be subject only to its pro-rata proportion of any deductions made from the payment of landowners' royalty, pursuant to the terms of said above mentioned lease.

Monthly accounting shall be made by assignor to assignee for all oil, gas or other hydrocarbon substances produced, saved and sold from the above described premises on or before the twenty-fifth (25th) day of the succeeding calendar month.

Assignee shall have the same right to inspection of records, premises, logs and cores as is accorded to the Lessor in said Lease.

Assignor agrees that it will execute and deliver to Assignee all division orders directed to purchasers of oil, gas or other hydrocarbon substances produced, saved and sold from said well, necessary or required to enable the Assignee to receive direct from such purchasers moneys due him hereunder.

The said assignor hereby warrants that it is the owner of the interest herein conveyed, and that the

same is not subject to any encumbrances whatsoever.

The assignor hereby guarantees that it will not sell, assign transfer or convey its estate, or any interest therein, in the above described property without first making adequate provision for the protection of any interest holders, and submitting a copy of the assignment thereof to the Commissioner of Corporations of the State of California. No subsequent assignment hereof will be valid or binding on the original assignor until and unless a copy thereof is first given to said assignor.

In Witness Whereof, the assignor herein has executed [17] this assignment the 27th day of March, 1939.

DEEP HOLE DRILLING
CORPORATION,
By L. WESTERHOLM,
President.
By CYRIL MOSS,
Secretary.

State of California,
County of Los Angeles—ss.

On this 27th day of March, 1939, before me, the undersigned, a Notary Public in and for said County and State, personally appeared L. Westerholm, known to me to be the President, and Cyril Moss, known to me to be the Secretary, of the Deep Hole Drilling Corporation, the corporation that executed the within Instrument, known to me to be the per-

sons who executed the within Instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

[Notarial Seal] L. PENMAN,
Notary Public in and for said County and State.

My commission expires Nov. 29, 1942.

State of California,
County of Los Angeles—ss.

On this 28th day of March, A.D., 1939, before me, Ruth Batey Hughes, a Notary Public in and for said County and State, personally appeared L. Westerholm, known to me to be the President, and Cyril Moss, known to me to be the Secretary of the Deep Hole Drilling Corporation, the Corporation that executed the within Instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) RUTH BATEY HUGHES,
Notary Public in and for said County and State.

My commission expires 3/10/43. [18]

EXHIBIT "B"

March 29th, 1939

Standard Oil Company of California
Standard Oil Building
Los Angeles, California

Attention Mr. A. E. Smothers.

Gentlemen:

On March 7th, 1939, Deep Hole Drilling Corporation addressed a letter to you as follows:

"We hereby direct that you pay to Mr. C. B. Callahan, 815 Rives-Strong Building, Los Angeles, California, twelve per cent (12%) of the proceeds of oil which your company purchases from the Deep Hole Drilling Corporation's No. 1 Well, known as the "Hopkins" Lease, situated on the following described property, to-wit:

The East 2 acres of the East 5 acres of the North 350.08 feet of Lot 50, of Tract 15, as per map recorded in Book 12, Page 189 of Maps, in the office of the County Recorder of Los Angeles County, State of California.

This order shall become effective as of March 1st, 1939, and shall cover all oil purchased by you from and after March 1st, 1939. This order is irrevocable unless consented to by C. B. Callahan."

You Are Hereby Directed That in lieu of paying the 12% of the proceeds of the oil which your Company purchases from said well, as provided for in said letter, that you pay the same to

Consolidated Royalties, Inc.
815 Rives-Strong Building,
Los Angeles, California.

This order is irrevocable unless consented to by Consolidated Royalties, Inc.

Very truly yours,
(Corporate Seal) DEEP HOLE DRILLING
CORPORATION,
By L. WESTERHOLM,
President.
By CYRIL MOSS,
Secretary.
C. B. CALLAHAN. [19]

[Endorsed]: Filed May 23, 1940. Samuel W. McNabb, Referee.

Filed: Dec. 12, 1941, R. S. Zimmerman, Clerk.
[20]

[Title of District Court and Cause.]

STIPULATION OF FACTS UPON ORDER TO
SHOW CAUSE DIRECTED TO CONSOLI-
DATED ROYALTIES, INC., A CORPORA-
TION, AND C. B. CALLAHAN, AND THE
ISSUES RAISED BY THE PETITION
AND ANSWER THERETO.

It Is Hereby Stipulated by and between Harry Ashton, Petitioner and Trustee in the above mat-

ter, and Respondents, Consolidated Royalties, Inc., a corporation, and C. B. Callahan, through their attorneys undersigned, that the following are the facts to be considered by the Referee in determining the issues raised by the Petition, the Order to Show Cause issued thereon under date of May 17, 1940, and the Answer to said petition and order to show cause filed by said Respondents.

It Is Further Stipulated that said Respondents, in submitting the issues upon this stipulation of facts, are reserving their objection to the jurisdiction of the Referee and of the Bankruptcy Court to summarily determine and adjudge title to the claimed ownership by Respondents of twelve per cent. (12%) of the oil produced from Deep Hole Well No. 1 and that this stipulation is made and entered into for the purpose of saving the time of Court and counsel and of expediting the hearing upon said matter. The facts with respect to this matter are as follows:

1. That under date of September 30, 1938, Henry C. Hopkins and Clarence V. Hopkins, as Lessors, entered into an Oil and Gas Lease with Twin Oil Company, a corporation, as Lessee, which lease in part covered the following described property, situate in the County of Los Angeles, State of California, to wit: [21]

The East 2 acres of the East 5 acres of the North 350.08 feet of Lot 50, Tract 15, as per map recorded in Book 12, Page 189 of Maps, in the office of the County Recorder of said County;

that said lease provided that the term thereof was for a definite number of years and so long thereafter as oil and/or gas should be produced therefrom in paying quantities; that thereafter the lessee's interest under said oil lease was assigned to Deep Hole Drilling Corporation, which Assignment was recorded on December 10, 1938, in Book 16207, Page 354 of Official Records in the office of the County Recorder of Los Angeles County, California.

2. That said Deep Hole Drilling Corporation drilled and completed its No. 1 Well on the above described property, which well was placed on production on February 5, 1939.

3. That under date of February 1, 1939, Deep Hole Drilling Corporation, as Seller, entered into an executory contract with Standard Oil Company of California, as Buyer, for the sale and purchase of all crude petroleum oil produced from the above described property. All deliveries thereof to be made from the tankage of Seller on said property into the pipeline of Buyer at which time title to said oil passed to Buyer.

4. That an application was filed by Deep Hole Drilling Corporation with the Department of Investments of the State of California, Corporation Department, on or before March 9, 1939, a copy of which application is attached hereto, marked Exhibit "A", and is by this reference made a part hereof, omitting, however, certain documents which

were attached thereto as exhibits and deemed immaterial to this matter, to wit,

Exhibit "A"—Leasehold agreements on Well No. 1

Exhibit "B"—Copy of Title Report on Well No. 1

Exhibit "D"—Map showing locations of Wells No. 1, 2 and 3.

5. That a permit was issued by the Commissioner [22] of Corporations on March 25, 1939, a copy of which permit is attached hereto, marked Exhibit "B" and is by this reference made a part hereof.

6. That pursuant to the authority granted by the aforesaid permit, Deep Hole Drilling Corporation did, on March 27, 1939, execute and deliver to Consolidated Royalties, Inc., a corporation, the document attached to Exhibit "A", marked Exhibit "C", and by this reference made a part hereof. That said Corporation did also execute and deliver to C. B. Callahan a conveyance identical in form with said Exhibit "C" attached to Exhibit "A", except that in each instance the blanks were filled in, 5% royalty interest being conveyed to Consolidated Royalties, Inc., and 7% royalty interest being conveyed to C. B. Callahan, and the same were duly executed, acknowledged, and delivered.

That as consideration for said conveyance, Consolidated Royalties, Inc., paid to Deep Hole Drilling Corporation the sum of \$4,750.00 cash, lawful money of the United States, and C. B. Callahan

paid to said Deep Hole Drilling Corporation the sum of \$6,650.00, lawful money of the United States, being \$950.00 for each one per cent (1%) royalty interest so conveyed, as authorized by said permit, to the respective Respondents.

7. That Deep Hole Drilling Corporation, pursuant to said permit, executed and delivered an option agreement to said Respondents, a copy of which Option Agreement is attached to Exhibit "A" marked Exhibit "I", and by this reference made a part hereof. That said options were never exercised by Respondents. Well No. 2 was abandoned and Well No. 3 was never drilled.

8. That said conveyances were recorded by Respondents in the office of the County Recorder of Los Angeles County, California, on March 30, 1939. That at the time said conveyances were made to Respondents, Deep Hole Drilling Corporation was solvent. That there were only approximately Four Thousand Dollars in unpaid obligations (Now provable in these proceedings) then unpaid in the drilling of Well No. 1, with the exception of the [23] claim of Howard Supply Company. That as part of said transaction, Howard Supply Company executed and delivered to the Commissioner of Corporations the letter which is attached to Exhibit "A", marked Exhibit "H", and by this reference made a part hereof.

9. That on March 29, 1939, Deep Hole Drilling Corporation executed and delivered to Standard Oil Company of California a Division Order, a

copy of which is attached hereto, marked Exhibit "C", and by this reference made a part hereof. That said Division Order was accepted by said Standard Oil Company. That said corporation at all times thereafter paid to Consolidated Royalties, Inc., said 12% of the proceeds of the sale of said oil, through the month of August, 1939, but has made no payment thereof since September 1, 1939. That there is now held by said Standard Oil Company and undisbursed, pursuant to said conveyances, through April 30, 1940, the total sum of \$846.08. That insofar as the 7% royalty interest of C. B. Callahan is concerned, Consolidated Royalties, Inc., has acted as his agent for the purpose of collecting said royalty and has no right, title or interest therein or thereto.

10. That on May 15, 1940, Respondents filed an action against said Standard Oil Company as the only Defendant in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, to recover the said sum of \$846.08. No application for permission to file said action against Standard Oil Company was made by Respondents to the Bankruptcy Court. On May 17, 1940, the Trustee obtained a restraining order against Respondents, restraining them from prosecution of any action to recover said claimed royalties.

11. That in addition to the obligations incurred in the drilling of Well No. 1, the Bankrupt's obligations are substantially only those incurred in the drilling of Well No. 2 subsequent to the acquisition

by Respondents of said 12% interest in Well No. 1, which was then on production. It may be assumed for the purpose of this matter only that the assets of the Bankrupt in Well No. 1 are [24] in excess of \$4,000.00, however, the actual value of such assets cannot be determined until final disposition of the estate.

12. Said Respondents did not at any time, nor have they ever, participated in the conduct, management or business of Deep Hole Drilling Corporation. The Trustee has not shown that any Creditor of the Bankrupt delivered materials to the Bankrupt, or performed labor for the Bankrupt upon Respondents' personal credit.

13. That Mr. Clark, Treasurer of Consolidated Royalties, Inc., a corporation, would testify that at the time of the purchase of said 12% royalty interest, Respondents were informed by Deep Hole Drilling Corporation, through Mr. Argood, its agent in negotiating the conveyance of such interest to Respondents, that the proceeds derived from the sale of the royalty interest would be used to discharge the obligations outstanding against Well No. 1, with the exception of the claim of Howard Supply Company; that the 12% royalty interest was purchased in Deep Hole Well No. 1 relying upon the statement of Mr. Argood and the letter from the Howard Supply Company above mentioned. (Note: The Trustee believes that the word "relying" used in this last sentence is a conclusion and objects to its use for this reason.)

14. That Deep Hole Drilling Corporation filed a petition under the provisions of Chapter XI of the national Bankruptcy Act on September 25, 1939, and petitioner, Harry Ashton, was appointed Receiver for said corporation in such proceedings. That thereafter, and on April 22, 1940, the corporation was adjudicated a Bankrupt, pursuant to said act and said Harry Ashton was appointed Trustee of the Estate of said Bankrupt and is now the duly appointed, qualified and acting trustee of said estate.

Dated this 24th day of June, 1940.

GEORGE T. GOGGIN and
RUSSELL B. SEYMOUR
By RUSSELL B. SEYMOUR,
Attorneys for Trustee—Harry
Ashton.

FLEMING & ROBBINS,
By C. S. TINSMAN,
Attorneys for Respondents, Con-
solidated Royalties, Inc., a
poration, and C. B. Callahan.

[25]

EXHIBIT "A"

Before the Department of Investment Division of
Corporations of the State of California.

In the Matter of the Application of
DEEP HOLE DRILLING CORPORATION
for a permit authorizing it to issue securities.

APPLICATION FOR PERMIT TO ISSUE
SECURITIES

Application is hereby made by Deep Hole Drilling Corporation for permission to issue securities, and in support thereof the following facts are submitted:

1. Applicant is a corporation duly organized and existing under and by virtue of the laws of the State of California, duly qualified to transact business in the County of Los Angeles. Heretofore applicant has filed with the Division of Corporations its application to issue capital stock, and reference is hereby made thereto.

2. Applicant is the owner, by assignment, of an Oil and Gas Lease dated the 30th day of September, 1938, by and between Henry C. Hopkins and Clarence V. Hopkins, as lessors, and Twin Oil Co., a California corporation, as lessee, insofar as the same pertains to the following described premises located in the County of Los Angeles, State of California, to wit:

The East two (2) acres of the North 350.08 feet of Lot Fifty (50), Tract No. 15, as per map recorded in Book 12, page 189 of Maps, in the office of the County Recorder of said County, Except any portion of the above described property within the lines of Beacon Street, as shown on map of Tract No. 437, recorded in Book 14, page 162 of Map Records,

which said Assignment of Oil and Gas Lease to applicant was recorded on December 10, 1938, in Book 16207, page 354, Official Records of Los Angeles County, California. [26]

3. Applicant has drilled and completed its No. 1 well upon the above described real property, which said well was placed on production on February 5, 1939; that said well is set with 7" casing at 4800 feet, with 367 feet of 5½" perforated liner, and is now producing approximately 400 barrels of oil per day with 250 pounds tubing pressure.

4. Applicant proposes to sell and issue to C. B. Callahan and/or Consolidated Royalties, Inc., or either of them, 12% royalty interest in said No. 1 well, in accordance with form of assignment attached hereto, made a part hereof, and marked Exhibit "C", at and for the selling price of \$950.00 for each one per cent; and said purchasers shall receive payment direct from the purchasers of the oil and gas.

5. Applicant further proposes to enter into an Option Agreement with C. B. Callahan and/or Con-

solidated Royalties, Inc., whereby they, or either of them, are given an option to purchase all or any part of a 15% royalty interest in the company's No. 2 well, situate upon the

West one-half ($W\frac{1}{2}$) of Lot Sixty-three (63), Tract No. 15, in the County of Los Angeles, State of California, as per map recorded in Book 12, page 189 of Maps, Records of the County Recorder of Los Angeles County, California,

at and for the selling price of \$850.00 for each one per cent; and also to enter into an Option Agreement with C. B. Callahan and/or Consolidated Royalties, Inc., wherein they are given the option to purchase all or any part of a 15% royalty interest in the company's No. 3 well, situate upon the

East one-half ($E\frac{1}{2}$) of said Lot Sixty-three (63)

at and for the selling price of \$850.00 for each one per cent. Applicant has agreed with said C. B. Callahan and Consolidated Royalties, Inc., that it will not issue, or cause to be issued, overriding royalty interests of more than 12% in its Well No. 1, and not more than overriding royalty interests of 15% each in its said Wells Nos. 2 and 3. Applicant's No. 2 well is now drilling at a depth of 3900 feet, and said applicant expects to have the same completed [27] within two weeks from date.

6. That attached hereto and made a part hereof are the following exhibits:

Exhibit "A"—Leasehold Agreements on Well No. 1

Exhibit "B"—Copy of Title Report on Well No. 1

Exhibit "C"—Proposed form of Royalty Assignment

Exhibit "D"—Map showing locations of wells No. 1, 2 and 3

Exhibit "E"—Copy of Minutes of Directors Meeting and resolution authorizing the filing of this Application.

Exhibit "F"—Statement of Production, Well No. 1

Exhibit "G"—Statement of Assets and Liabilities

Exhibit "H"—Letter signed by Howard Supply Company (creditor of applicant) agreeing not to interfere with payment of royalties.

Exhibit "I"—Form of proposed Option Agreement.

Wherefore, applicant prays that it be given and granted authority to issue and sell to C. B. Callahan and/or Consolidated Royalties, Inc., or either of them, a twelve (12%) per cent royalty interest in its No. 1 well, at and for the selling price of Nine Hundred Fifty (\$950.00) dollars per each one (1%) per cent. to net the corporation the full sell-

ing price therefor; and further, for authority to enter into the option agreements herein referred to.

DEEP HOLE DRILLING

CORPORATION,

By L. WESTERHOLM,

President.

Applicant.

HANNA AND MORTON,

By CHESTER F. DOLLEY,

Attorneys for Applicant. [28]

State of California,

County of Los Angeles—ss.

L. Westerholm, being first duly sworn, desposes and says:

That he is President of Deep Hole Drilling Corporation, a corporation, applicant herein, and makes this verification for and on behalf of said corporation; that he has read the foregoing Application and knows the contents thereof, and that the statements contained therein are true of his own knowledge.

L. WESTERHOLM.

Subscribed and sworn to before me this 9th day of March, 1939.

(Seal) ELSIE H. MACDONELL,
Notary Public in and for said County and State.

[29]

EXHIBIT "C"

ASSIGNMENT OF ROYALTY INTEREST
OVERRIDING

Know All Men by These Presents, that

Whereas, Deep Hole Drilling Corporation, a corporation, is the owner and holder, by assignment, of that certain oil and Gas Lease dated September 30, 1938, by and between Henry C. Hopkins and Clarence V. Hopkins, as lessors, and Twin Oil Co., a California corporation, as lessee, insofar as the same pertains to the following described real property located in Los Angeles County, California, to wit:

The West two (2) acres of the North 350.08 feet of Lot Fifty (50), Tract No. 15, in the County of Los Angeles, State of California, as per map recorded in Book 12, Page 189 of Maps, in the office of the County Recorder of said County,

Except any portion of the above described property within the lines of Beacon Street, as shown on map of Tract No. 437, recorded in Book 14, page 162 of said Map Records;

which said Assignment of Oil and Gas Lease was recorded on December 10, 1938, in Book 16207, Page 354, Official Records of Los Angeles County, California; and

Whereas, said Deep Hole Drilling Corporation has completed a well upon said above described premises, known as Deep Hole Drilling Corporation Well No. 1,

Now, Therefore, for and in consideration of the sum of Ten (\$10.00) Dollars, and other good and valuable consideration, receipt of which is hereby acknowledged, Deep Hole Drilling Corporation, a corporation, does hereby sell, assign, transfer and set over unto

An overriding royalty interest of per cent. of the oil produced, saved and sold, and per cent. of the net proceeds received by the operator from the sale of all gas [30] casinghead gas, and all gasoline produced, saved and sold from the above described premises, from and including March 31st, 1939, subject to all the terms, covenants and conditions of said above mentioned lease. Said royalty interest shall not be chargeable with any operating cost of the well or lease, and shall be subject only to its pro-rata proportion of any deductions made from the payment of landowners' royalty, pursuant to the terms of said above mentioned lease.

Monthly accountings shall be made by assignor to assignee for all oil, gas or other hydrocarbon substances produced, saved and sold from the above described premises on or before the twenty-fifth (25th) day of the succeeding calendar month.

Assignee shall have the same right to inspection of records, premises, logs and cores as is accorded to the lessor in said lease.

Assignor agrees that it will execute and deliver to Assignee all division orders directed to purchasers of oil, gas or other hydrocarbon substances produced, saved and sold from said well, necessary

or required to enable the Assignee to receive direct from such purchasers moneys due him hereunder.

The said assignor hereby warrants that it is the owner of the interest herein conveyed, and that the same is not subject to any encumbrances whatsoever.

The assignor hereby guarantees that it will not sell, assign, transfer or convey its estate, or any interest therein, in the above described property without first making adequate provision for the protection of any interest holders, and submitting a copy of the assignment thereof to the Commissioner of Corporations of the State of California. No subsequent assignment hereof will be valid or binding on the original assignor until and unless a copy thereof is first given to said assignor.

In Witness Whereof, the assignor herein has executed [31] this assignment the day of, 1939.

DEEP HOLE DRILLING
CORPORATION,

By

President.

By

Secretary. [32]

EXHIBIT "E"

MINUTES OF SPECIAL MEETING OF THE
BOARD OF DIRECTORS OF DEEP HOLE
DRILLING CORPORATION

A special Meeting of the Board of Directors of Deep Hole Drilling Corporation was held at Los Angeles, California, on the 9th day of March, 1939, at the hour of 10 o'clock A. M., pursuant to written waiver of notice thereof and consent thereto by all of the directors of the company. The following directors were present:

L. Westerholm

Cyril Moss.

Mr. Westerholm acted as chairman of the meeting, and Mr. Moss as Secretary of the meeting.

On motion duly made, seconded and carried, the following resolution was adopted:

Resolved: That this corporation apply to the Division of Corporations of the State of California for permit authorizing it to issue and sell to C. B. Callahan and/or Consolidated Royalties, Inc., a corporation, or either of them, a 12% royalty interest in the company's No. 1 well, at and for the selling price of \$950.00 per each 1%, to net the corporation the full selling price therefor; and further, for authority to enter into an option agreement with C. B. Callahan and/or Consolidated Royalties, Inc. whereby they, or either of them, are given an

option to purchase a 15% interest in the company's No. 2 well, situate upon the West half of Lot 63, Tract 15, at and for the selling price of \$850.00 per each 1%, and for authority to enter into an option agreement with C. B. Callahan and/or Consolidated Royalties, Inc. whereby they, or either of them, are given an option to purchase a 15% interest in the company's No. 3 well, situate upon the East half of said Lot 63, at and for the selling price of \$850.00 for each 1%.

There being no further business to come before the meeting, the same was upon motion duly made, seconded and carried, adjourned.

CYRIL MOSS

Secretary.

Approved:

L. WESTERHOLM

President. [33]

EXHIBIT “F”

Deep Hole Drilling Corporation

DAILY PRODUCTION REPORT**DEEP HOLE #1**

2/7/39.....	404.3 Bbls
2/8/39.....	489.6 “
2/9/39.....	498.6 “
10	495.6 “
11	489.2 “
12	439.5 “
13	449.9 “
14	445.0 “
15	412.5 “
16	258.2 “
17	400.0 “
18	408.4 “
19	407.7 “
20	383.0 “
21	395.9 “
22	394.0 “
23	427.6 “
24	380.2 “
25	382.5 “
26	393.8 “
27	397.9 “
28	394.2 “
3/1/39.....	378.3 “
3/2/39.....	381.1 “
3/3/39.....	369.9 “
3/4/39.....	347.2 “
3/5/39.....	340.2 “
3/6/39.....	330.2 “
3/7/39.....	371.2 “

11,665.7 Bbls

SHIPMENTS

Previous to time Standard Oil Co. had pipe line connected to our tanks, oil shipped as follows:

2/ 8/39—Mercury Petroleum Corporation.....	852.40 bbls
2/ 9/39—Mercury	533.50 “
2/12/39— “	865.08 “
2/14/39— “	857.68 “
2/15/39— “	653.95 “

Total to Mercury.....3,762.69 “

Shipments to Standard Oil Company:

Our tanks are 1000 bbl tanks and in shipping, the oil was drawn from the tanks to the usual depth, showing each shipment as approximately 900 bbls:

2/18/39.....	about 900 bbls
2/21/39.....	about 900 bbls
2/23/39.....	about 900 bbls
2/25/39.....	about 900 bbls
2/28/39.....	about 900 bbls
3/ 2/39.....	about 900 bbls
3/ 4/39.....	about 900 bbls

Approx. 6,300 “

3/ 7/39..... 900 “

Making a total of 7,200 bbls more or less shipped to Standard Oil Company to date of 3/7/39, incl.

[34]

EXHIBIT "G"

Deep Hole Drilling Corporation

STATEMENT OF ASSETS & LIABILITIES

March 6, 1939

Assets

Cash in Bank.....	6,650.00	
Accounts Receivable	8,000.00	
(Standard Oil Co.)		
Derrick Equipment, Tanks, Tubular		
Goods—No. 1 Well.....	17,038.18	
Cost of Lease—No. 1 Well.....	3,500.00	
Interest in No. 1 Well		
(78% @ \$1500.00).....	117,000.00	152,188.18
		<hr/>
Cost to date—No. 2 Well.....	10,000.00	
Cost 5-acres offset lease to No. 1 Well	2,650.00	12,650.00
		<hr/>
Total Assets		164,838.18
		<hr/>

Liabilities

Open Accounts Payable—No. 1.....	1,652.76	
(not Yet Due)		
Contracts Payable—No. 1 Well.....	2,309.24	
(30-60-90 Days)		
Contract Payable No. 1 Well Howard		
Supply Co. (Payable only from 40%		
of oil produced & sold).....	12,864.35	16,826.35
		<hr/>
Open Accts. Payable—Not Yet Due—		
No. 2 Well (Approximately).....		2,500.00
		<hr/>
Total Liabilities		19,326.35
Estimated Net Worth.....		145,511.83
		<hr/>

Total Liabilities & Estimated Net Worth 164,838.18

Note: #1 Well completed Feb. 6, 1939, and flowing steadily at the rate of approximately 400 barrels per day.
#2 Well now drilling below 3,600 feet in oil sand with every indication of being brought in an excellent well.

EXHIBIT "H"

Letter Head of Howard Supply Company
Los Angeles, California.

March 8, 1939

Division of Corporations,
State of California,
State Building,
Los Angeles, California.

Gentlemen:

This is to advise you that Howard Supply Company, as a creditor of Deep Hole Drilling Co., will not in anywise whatsoever interfere with the payment of royalties to be issued by Deep Hole Drilling Co. on its Well No. 1 situated upon the following described real property, to wit:

The East 2 acres of the North 350.08 feet of Lot 50 of Tract No. 15, in the County of Los Angeles, State of California, as per map recorded in Book 12, Page 189, of Maps, in the office of the County Recorder of said County;

Except any portion of the above described property within the lines of Beacon Street, as shown on map of Tract No. 437, recorded in Book 14, Page 162 of said Map Records.

We have been advised by Deep Hole Drilling Co. that it is applying to the Division of Corporations for a permit authorizing it to issue 12% royalty in its No. 1 well, and we will not, as a creditor or otherwise, interfere in any manner what-

soever with the payment of said 12% royalty interest.

Very truly yours,

HOWARD SUPPLY COMPANY

By J. P. MOSELEY

Secretary-Treasurer

JPM/eg [36]

EXHIBIT "I"

OPTION AGREEMENT

This Agreement made and entered into this 27th day of March, 1939, by and between Deep Hole Drilling Corporation, a corporation, hereinafter designated as First Party, and C. B. Callahan and Consolidated Royalties, Inc., a corporation, hereinafter designated as Second Parties,

Witnesseth:

For and in consideration of the sum of One (\$1.00) Dollar, paid by Second Parties to First Party, receipt of which is hereby acknowledged, said First Party does hereby give and grant unto Second Parties, or either of them, their heirs, successors or assigns, the exclusive right or privilege of purchasing all or any part of the following described oil royalties:

Fifteen (15%) royalty interest in Deep Hole Drilling Corporation Well No. 2, situate upon the following described real property, to wit:

The West half (W $\frac{1}{2}$) of Lot 63, Tract 15, in the County of Los Angeles, State of Cali-

fornia, as per map recorded in Book 12, page 189 of Maps, Records of the County Recorder of said County;

Fifteen (15%) royalty interest in Deep Hole Drilling Corporation Well No. 3, situate upon the following described real property, to wit:

The East half ($E\frac{1}{2}$) of Lot 63, Tract 15, in the County of Los Angeles, State of California, as per map recorded in Book 12, Page 189 of Maps, Records of the County Recorder of said County.

The option price for said royalties is Eight Hundred Fifty (\$850.00) Dollars for each one per cent, and upon election to purchase by Second Parties, or either of them, of all or any amount of said royalties, said sum of Eight Hundred Fifty (\$850.00) Dollars per each one per cent shall be paid upon said election, which election shall expire five (5) days after the company's No. 2 well is placed upon production. That said well shall be deemed [37] placed upon production when the oil from said well has been turned into the tanks situated upon said well.

Said election upon the company's No. 3 well shall expire ten (10) days after the company's No. 3 well is placed upon production. That said well shall be deemed placed upon production when the oil from said well has been turned into the tanks situated upon said well.

Notice of Election to purchase hereunder by said Second Parties, or either of them, shall be in writing, and shall be delivered to First Party at 1006 Garfield Bldg., 403 West 8th Street Los Angeles, California.

That the form of royalty assignment to be used hereunder shall be substantially the same form as used by First Party in the issuance of royalties to Second Parties in its No. 1 well, an exact copy of which said assignment is attached hereto, and marked Exhibit "A".

In witness whereof, said parties have caused this agreement to be executed on the day and year first hereinabove written.

(Seal)

DEEP HOLE DRILLING CORPO-
RATION

By L. WESTERHOLM

President

By CYRIL MOSS

Secretary

First Party.

(Seal)

C. B. CALLAHAN

CONSOLIDATED ROYALTIES,
INC.

By W. R. WHEAT

President

By E. W. CLARK

Secretary.

Second Parties. [38]

EXHIBIT "B"

Before the Department of Investment
Division of Corporations of the
State of California

PERMIT

In the Matter of the application of
DEEP HOLE DRILLING CORPORATION
for a permit authorizing it to sell
and issue its securities

File No. 68781LA

Receipt No. LA 5169

This Permit Does Not Constitute a Recommendation or Endorsement of the Securities Permitted to Be Issued, But Is Permissive Only

Deep Hole Drilling Corporation, A California corporation, is hereby authorized to sell and issue its securities as hereinbelow set forth:

1. To sell and issue to C. B. Callahan and Consolidated Royalties, Inc. an aggregate of not to exceed, to either or both of them, 12 one per cent participating royalty interests, without maintenance charge, of all oil, gas and other hydrocarbon substances produced and saved from the well designated as Well No. 1, situated upon the premises described in the application, at and for the price of \$950.00 for each one per cent participating royalty interest, cash, lawful money of the United States, for the uses and purposes recited in the appli-

cation, and so as to net applicant the full amount of the selling price thereof, upon the condition that the applicant shall execute and deliver as evidence of ownership thereof a royalty assignment or assignments in the form filed with the application.

2. To issue to C. B. Callahan and Consolidated Royalties, Inc. an option or options in the form filed with the application as Exhibit "I", evidencing the right to purchase 15 one per cent participating royalty interests of all oil, gas and other hydrocarbon substances produced and saved from the wells designated as Wells Nos. 2 and 3, situated upon the premises described in the application, for the considerations recited therein. [39]

This permit is issued upon each of the following conditions:

(a) That none of the options authorized by Paragraph 2 hereof shall be sold or issued unless and until the applicant first shall have selected an escrow holder and said escrow holder shall have been first approved in writing by the Commissioner of Corporations; that, when issued, all certificates evidencing any of said options shall be forthwith deposited with said escrow holder, to be held as an escrow pending the further written order of the said Commissioner; that the receipt of said escrow holder

for said certificates shall be filed with said Commissioner; and that the owner or persons entitled to said options shall not consummate a sale or transfer of said options, or any interest therein, until the written consent of said Commissioner shall have been obtained so to do.

(b) That unless revoked, suspended or extended by alteration or amendment, upon application filed on or before the date of expiration specified in this condition and upon such terms and conditions as the Commissioner may deem proper, all authority to sell securities under issuance clauses 1 and 2 of this permit shall terminate and expire on the 24th day of June, 1939. All other issuance clauses and/or conditions of this permit shall remain in full force and effect until revoked, suspended, altered or amended by appropriate order of the Commissioner.

Dated: Los Angeles, California, March 25, 1939.

(Seal)

EDWIN M. DAUGHERTY

Commissioner of Corporations

By J. A. HAHN

J. A. HAHN

Deputy

HVW:DG [40]

EXHIBIT "C"

March 29th, 1939

Standard Oil Company of California
Standard Oil Building
Los Angeles, California

Attention Mr. A. E. Smothers

Gentlemen:

On March 7th 1939, Deep Hole Drilling Corporation addressed a letter to you as follows:

"We hereby direct that you pay to Mr. C. B. Callahan, 815 Rives-Strong Building, Los Angeles, California, twelve per cent (12%) of the proceeds of oil which your company purchases from the Deep Hole Drilling Corporation's No. 1 Well, known as the "Hopkins" Lease, situated on the following described property, to wit:

The East 2 acres of the East 5 acres of the North 350.08 feet of Lot 50, of Tract 15, as per map recorded in Book 12, Page 189 of Maps, in the office of the County Recorder of Los Angeles County, State of California.

This order shall become effective as of March 1st 1939, and shall cover all oil purchased by you from and after March 1st 1939. This order is irrevocable unless consented to by C. B. Callahan."

You are hereby directed that in lieu of paying the 12% of the proceeds of the oil which your Com-

pany purchases from said well, as provided for in said letter, that you pay the same to

Consolidated Royalties, Inc.
815 Rives-Strong Building
Los Angeles California

This order is irrevocable unless consented to by Consolidated Royalties, Inc.

Very truly yours,
(Seal)

DEEP HOLE DRILLING CORPO-
RATION,
By L. WESTERHOLM
President
By CYRIL MOSS
Secretary
C. B. CALLAHAN [41]

[Endorsed]: Filed Jun. 25, 1940. Samuel W. McNabb, Referee. Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [42]

[Title of District Court and Cause.]

REFEREE'S MEMO OPINION RE INTER-
ESTS OF CONSOLIDATED ROYALTIES,
INC., AND C. B. CALLAHAN.

Claimants on March 27, 1939, purchased 12½ per cent royalty interest of the oil produced, saved and sold, etc., from a certain well known as "Deep Hole No. 1". In order to complete this well, general

trade creditors furnished supplies of the value of about \$4,000, which claims have never been paid and which created provable claims in this estate. After finishing Deep Hole No. 1 well, the bankrupt proceeded to drill a second well, in which enterprise a large deficiency arose, and the question arising here is what is the status of the interest of Consolidated Royalties and C. B. Callahan insofar as other creditors are concerned.

I am of the opinion that the claimants here are co-adventurers with the bankrupt insofar as Well No. 1 is concerned, and that these claims should be subordinated to the extent of claims of those who furnished supplies or other commodities for the completion of Well No. 1; that claimants should not be subordinated to the general claims arising from the drilling of Well No. 2, or otherwise, other than those in No. 1. No subordination to any claim of Howard Supply Company against Well No. 1 is proper for the reason that at the time of the issuance of the permit by the Corporation Commissioner the Howard Supply Company expressly waived any such right of subordination. The Court is not advised as to the exact amount of the claims, which, under this ruling will have priority over claimants, but if not agreed to by the parties, further testimony may be taken regarding same. [43]

Counsel for the Trustee will prepare order in accordance with the foregoing decision.

Dated: June 26, 1940.

S. W. McNABB

Referee.

[Endorsed]: Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [44]

[Title of District Court and Cause.]

STIPULATION THAT REFEREE HUBERT F.
LAUGHARN MAY SIGN ORDER.

It is stipulated by Raphael Dechter and Russell B. Seymour, as attorneys for Harry Ashton, Trustee Samuel W. McNabb in respect to the rights Consolidated Royalties, Inc. and C. B. Callahan, respondents herein, as follows:

Whereas, hearings were had before former Referee Samuel W. McNabb in respect to the rights of the parties hereto in and to a certain oil well commonly known as Deep Hole Well No. 1, located at Torrance, California, on property described as follows, to-wit:

East 2 acres of the East 5 acres of the North
350.08 feet of Lot 50, Tract 15, Los Angeles
County, State of California,

and in and to the production and the proceeds from such production from said oil well, and in and to the proceeds of said production then and now being held by Standard Oil Company of California, and after said hearings and the submission of authori-

ties, said referee orally authorized certain findings of fact and conclusions of law and orders based thereon, but prior to the signing of any written findings or orders, said referee passed away, and

Whereas, Referee Hubert F. Laugharn is now the duly qualified and acting referee in bankruptcy in place of said former Referee McNabb, and

Whereas, the parties hereto have agreed on the form of said [45] findings and order (same being filed herewith) now, therefore,

It is stipulated that said Referee Hubert F. Laugharn may sign said findings and order and to the same effect as if same were signed by said Referee Samuel W. McNabb; and, further, that said Referee Laugharn may prepare, execute, and file such additional papers, referee's certificate, etc. as may be required or convenient in the event of any review or appeal of or from said findings or order.

Dated this 10 day of February, 1941.

RAPHAEL DECHTER and

RUSSELL B. SEYMOUR

By RUSSELL B. SEYMOUR

Attorneys for the Trustee.

FLEMING & ROBBINS

By C. S. TINSMAN

Attorneys for the respondents.

[Endorsed]: Filed Nov. 26, 1941. Hubert F. Laugharn, Referee. Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [46]

[Title of District Court and Cause.]

ORDER RE INTERESTS OF CONSOLIDATED
ROYALTIES, INC., AND C. B. CALLAHAN
IN OIL WELL AND PROCEEDS OF PRO-
DUCTION.

Harry Ashton, trustee herein, having filed a petition for an order to show cause directed to Consolidated Royalties, Inc., and C. B. Callahan, among others, to show cause, if any there be, why a further order should not be made in respect to the rights of said persons in and to a certain oil well commonly known as Deep Hole Well #1 located at Torrance, California, on property described as follows, to-wit:

East 2 acres of the East 5 acres of the North
350.08 feet of Lot 50, Tract 15, Los Angeles
County, State of California,

and in and to the production and the proceeds from such production from said oil wells, and in and to the proceeds of said production then and now being held by Standard Oil Company of California, and said matter having duly come on for hearing, Fleming & Robbins appearing on behalf of said respondents, and Raphael Dechter (George T. Goggin of counsel) and Russell B. Seymour appearing on behalf of said trustee, and evidence having been adduced and a stipulation of facts having been filed with the undersigned referee, and briefs having been filed, and the matter submitted to the referee for his findings and orders, now therefore, the court finds as follows, to-wit:

1. That the debtor filed its petition under the provisions of Chapter XI of the Bankruptcy Act of September 23, 1939, and Harry Ashton was appointed receiver in such proceedings; [47] that thereafter on April 22, 1940, the debtor was adjudicated a bankrupt and said Harry Ashton was appointed, trustee of the estate of said bankrupt and now is the duly appointed, qualified and acting trustee of said estate.

2. That at all times since the filing of said petition under Chapter XI the oil well and oil produced therefrom was in the physical possession of the said receiver, and, upon his qualification, of the said trustee, and was operated by said trustee and receiver.

3. That on or about December 10th, 1938, by mesne assignment, the bankrupt became the sub-lessee by virtue of the assignment of an oil and gas lease recorded December 10, 1938, Book 16207, Page 354 of Official Records in the Office of the County Recorder, Los Angeles County, and commenced the drilling of an oil and gas well on said premises, which well was placed on production February 5th, 1939.

4. That the cost of the drilling of said oil well has not been paid in full by said bankrupt and there is, at this time, approximately \$4000.00 of indebtedness arising from said drilling, which indebtedness is provable in these proceedings, exclusive of claim of Howard Supply Company.

5. That under date of February 1st, 1939, the bankrupt entered into an executory contract with

Standard Oil Company of California as buyer, for the sale and purchase of all crude oil produced from the said well, delivery to be made at the pipe line of the buyer; that at all times since the date of said agreement, the Standard Oil Company of California has been purchasing, and is now purchasing, the oil produced from said well.

6. That on or about March 9, 1939, the bankrupt applied to the Department of Investments of the State of California, [48] Corporation Department, for authority to sell to the respondents 12% royalty interest in said well at the price of \$950.00 for each 1%, and for further authority to enter into an option agreement with said respondents whereby they could purchase all or any part of a 15% royalty interest in a second well of the bankrupt known as Deep Hole Well #2, and a further option agreement whereby the respondent could purchase all or any part of a 15% royalty interest in a third well of the bankrupt commonly known as Deep Hole Well #3, said wells #2 and #3 to be located on nearby property.

7. That on or about March 25th, 1939, a permit was issued by the Department of Investments authorizing the bankrupt to sell and issue to C. B. Callahan and Consolidated Royalties, Inc., an aggregate of not to exceed to either or both of them twelve 1% participating royalty interests without maintenance charge and authorizing the bankrupt to execute and deliver as evidence of the ownership thereof a royalty assignment or assignments

in the form filed with the application; copies of said permit and of said royalty assignment are attached to the Stipulation of Facts.

8. That thereafter the bankrupt did, on March 27th, 1939, execute and deliver to the respondents assignments of 12% interest in and to said well #1, which interests were referred to as "overriding royalty interests"; that payment was made by the respondents to the bankrupt at the rate prescribed in the permit to-wit: the total sum of \$11,400.00. In addition, the bankrupt executed the option referred to in said permit which however, were never exercised by said respondents, said well #2 being abandoned and said well #3 never being drilled. The conveyances of said royalty interests were recorded in the office of the County Recorder of Los Angeles County, California, on March 30, 1939. [49]

9. That the bankrupt, on March 29, 1939, executed and delivered to said Standard Oil Company of California, a Division Order whereby that company was directed to pay to the respondents 12% of the proceeds of the sale of oil from the well, which 12% was paid to the respondents through the month of August, 1939; that no payments have been made since September 1st, 1939; that there is now in the hands of Standard Oil Company of California, and undisbursed, being the proceeds of said 12% up to April 30th, 1940, the total sum of \$846.08.

10. That on May 15, 1940, respondents filed an action against said Standard Oil Company of Cali-

fornia for the recovery of said sum of \$846.08; that no permission was granted by the Bankruptcy Court for authority to sue said Standard Oil Company.

11. That on May 17, 1940, the undersigned Referee issued a restraining order against respondents for prosecuting said Municipal Court action, pending further order of the Court.

12. That in addition to the \$4,000.00 in unpaid obligations incurred in drilling said Well No. 1, the substantial balance of the provable obligations of the bankrupt estate are the claims of the Howard Supply Company and other claims resulting from the drilling of Well No. 2 subsequent to the acquisition by respondents of their said 12% royalty interests in Well No. 1.

13. That the respondents did not, at any time, participate in the conduct, management or business of the bankrupt. The trustee has not shown that any creditor of the bankrupt delivered materials to the bankrupt or performed labor for the bankrupt upon respondents' personal credit.

14. That the trustee does not have assets or funds sufficient to pay in full the claims of creditors arising from the drilling of said wells #1 and #2, or either of them, [50]

15. That prior to the purchase of said percents by respondents, Howard Supply Company, a corporation, and a substantial creditor herein, agreed in writing that it would not interfere with the rights of respondents in and to said 12% of the proceeds therefrom.

CONCLUSIONS OF LAW

1. That the rights and interests of said respondents in and to the oil produced, saved and sold and in and to the net proceeds received from the sale of all gas, casinghead gas and all gasoline produced, saved and sold from said Well No. 1 are subject and subordinate to the rights and interests of the trustee to the extent of \$4,000.00, being the indebtedness incurred and now unpaid in the drilling of said well prior to the purchase by respondents of their interest in said well, with the exception of the claim of Howard Supply Company.

2. That the proceeds from said 12%, including all proceeds after April 30, 1940, in addition to said sum of \$846.08 in the hands of said Standard Oil Company of California, are the property of the said trustee, free and clear of any right, title, interest or claim on the part of said respondents.

ORDER

It is therefore ordered that the right, title and interest of C. B. Callahan and Consolidated Royalties, Inc., a corporation, in and to twelve percent (12%) of the oil produced, saved and sold and in and to 12% of the net proceeds received from the sale of all gas, casinghead gas and gasoline produced, saved and sold from Well No. 1, and in and to the funds in the hands of the Standard Oil Company of California in the amount [51] of \$846.08, plus such further proceeds as have accrued since April 30, 1940, is subject and subordinate to the \$4,000.00 in unpaid claims of creditors arising in

the drilling of Well No. 1, exclusive of the claim of Howard Supply Company. Should said claims be paid to the extent of \$4,000.00 the interest of respondents in and to said Well No. 1 shall thereupon be free and clear of any and all other claims of said bankrupt estate or creditors of said bankrupt and the 12% of the proceeds from the production of said wells, evidenced by respondents' royalty assignments, shall thereafter be paid to respondents.

It is further ordered that the said Standard Oil Company of California shall pay over to the trustee all proceeds from said 12% until further order of a court of competent jurisdiction.

It is further ordered that said respondents be, and hereby are, restrained from prosecuting any action in any court in respect to the proceeds of production from said property unless leave from this court first be had.

Dated this 26 day of November, 1941.

HUBERT F. LAUGHARN

Referee in Bankruptcy.

Approved as to form.

FLEMING & ROBBINS

By C. S. TINSMAN

Attorneys for Consolidated Royalties, Inc. and C. B. Callahan.

[Endorsed]: Filed Nov. 26, 1941. Hubert F. Laugharn, Referee. Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [52]

[Title of District Court and Cause.]

PETITION FOR REVIEW

Come now Consolidated Royalties, Inc., a corporation, and C. B. Callahan and petition for review of that certain order made by the above entitled Court on November 26, 1941, a copy of which is attached hereto, marked Exhibit "A", and made a part hereof, upon the following grounds, which are the alleged errors in respect thereto:

1. That said order is not sustained by the evidence;

2. That said order is against the law;

3. That the Referee erred in the following respects:

(a) In ordering that the 12% royalty interest of C. B. Callahan and Consolidated Royalties, Inc., was subject and subordinate to \$4,000.00 in unpaid claims of creditors arising in the drilling of Well No. 1;

(b) The Referee did not have jurisdiction under Chapter XI of the Bankruptcy Act to deprive C. B. Callahan and Consolidated Royalties, Inc., of their property in the summary manner attempted;

(c) The royalty assignment owned by respondents conveyed an interest in real property to respondents, which royalty interests were recorded and gave notice to creditors extending credit that the Deep Hole Drilling Company had no further interest in said royalty. The bankrupt deprived

itself of any interest in said royalty by said assignment; [53]

4. That by said order the property of respondents is unjustly confiscated and they are deprived of their property in violation of the provisions of the Constitution. Said order was based on a rule of property which is no longer recognized in the State of California. The Referee failed to follow the law of the State;

5. The facts as found show that no credit was extended to the debtor upon respondents' personal credit.

Wherefore, Respondents pray that the said order of the Referee may be reversed, annulled and set aside, and for such other and further order as may be meet and just in the premises.

CONSOLIDATED ROYALTIES, INC.,
(Corporate Seal) By W. R. WHEAT,

President.

By E. W. CLARK,
Secretary.

C. B. CALLAHAN,
Petitioners

FLEMING & ROBBINS,
By C. S. TINSMAN,
Attorneys for Petitioners.

[54]

State of California,
County of Los Angeles—ss.

E. W. Clark, being by me first duly sworn, deposes and says:

That Consolidated Royalties, Inc., is a corporation and that affiant is an officer thereof, to wit, the Treasurer, and as such officer makes this verification for and on behalf of said corporation, one of the respondents in the above entitled action; that he has read the foregoing Petition for Review and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

E .W. CLARK.

Subscribed and sworn to before me this 29th day of November, 1941.

(Seal) RUTH BATEY HUGHES,
Notary Public in and for the County of Los Angeles, State of California.

(For Exhibit "A" Attached hereto; see preceding Order.)

[Endorsed]: Filed Dec. 2, 1941. Hubert F. Laugham, Referee. Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [55]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Paul J. McCormick, Judge of the
District Court of the United States, in and for
the Southern District of California, Central
Division:

The debtor in this case filed in this Court on the 23rd day of September, 1939, a petition under the provisions of Chapter XI of the National Bankruptcy Act, which was approved by this Court as being properly filed under section 322. On April 22, 1940, the debtor was adjudicated a bankrupt. On May 17, 1940, an Order to Show Cause was issued direct to the respondents, Consolidated Royalties, Inc., and C. B. Callahan, returnable on May 27, 1940, which order to show cause required said respondents to show cause why an order should not be made directing the Standard Oil Company of California to turn over to the Trustee in Bankruptcy the proceeds of all production theretofore shipped and thereafter shipped and further decreeing that respondents had no right, title or interest in or to the production from said wells, and **fixing** and classifying the rights of respondents with respect to general creditors, and restraining respondents from proceeding in any action to collect the proceeds held by the Standard Oil Company of California. An answer was filed to said order to show cause by the said respondents. Said order to show cause was continued from time to time and there-

after and on June 24, 1940, a stipulation was entered into between the said Trustee and respondents, through their attorneys, as to the [56] facts to be considered by the Court in arriving at its conclusions in said matter and said matter was thereupon submitted.

Thereafter and on June 26, 1940, the Honorable Samuel W. McNabb, as Referee, filed his memorandum opinion re the interests of Respondents. Thereafter, and prior to signing an Order with respect thereto, the said Referee died and a stipulation was entered into between said Trustee and said respondents, through their attorneys, consenting to the signing of the formal order in said matter by Referee Hubert F. Laugharn, and pursuant to said stipulation, said order was signed on November 26, 1941.

The question to be decided on review is whether the order subordinating the respondents' royalty interests to the interests of general creditors of Deep Hole Well # 1, to the extent of \$4,000.00, was a proper order under the law and circumstances.

There is sent up herewith the following documents:

1. Petition of Harry Ashton, as Trustee, on Order to Show Cause.
2. Order to Show Cause and Restraining Order dated May 17, 1940.
3. Answer of Respondents, Consolidated Royalties, Inc., a corporation, and C. B. Callahan, to

Order to Show Cause and petition upon which it is based.

4. Stipulation of Facts upon such Order to Show Cause, Petition and Answer.

5. Memorandum Opinion of Samuel W. McNabb, Referee.

6. Stipulation that Referee Hubert F. Laugharn might sign order.

7. Order re interests of Consolidated Royalties, Inc., and C. B. Callahan.

8. Petition for Review of the Referee's Order.

Dated: December 11, 1941.

HUBERT F. LAUGHARN,

Referee in Bankruptcy.

[Endorsed]: Filed Dec. 12, 1941. R. S. Zimmerman, Clerk. [57]

[Title of District Court and Cause.]

NOTICE OF HEARING OF PETITION
FOR REVIEW

To: Fleming & Robbins, Los Angeles Stock Exchange Office Bldg., Los Angeles, California, attorneys for Consolidated Royalties, Inc., and C. B. Callahan; Lawler, Felix & Hall, Marcus Mattson and William T. Coffin, 800 Standard Oil Bldg., Los Angeles, California, Attorneys for Standard Oil Company of California; O. C. Sattinger, 1016 Southern California Gas Company Bldg., Los Angeles, California, Attorney for Howard Supply

Company; and George Appell and Cyril Moss, 1006 Garfield Bldg., Los Angeles, California, Attorneys for Deep Hole Drilling Corproation, Debtor.

You, and each of you, will please take notice that on January 12th, 1942, at the hour of 10 A. M. or as soon thereafter as counsel may be heard, a hearing will be had before the Honorable Paul J. McCormick in his courtroom, Federal Bldg., Los Angeles, California, on the Petition for Review of Referee's Order dated November 26, 1941, in connection with which the Referee's Certificate On Review was filed with the Clerk of the above court December 12th, 1941.

A memorandum of Points and Authorities is served herewith. Dated this 27th day of December, 1941.

RUSSELL B. SEYMOUR,
Attorney for Harry Ashton,
Trustee in the Above Matter.

[Endorsed]: Filed Dec. 30, 1941. R. S. Zimmerman, Clerk. [58]

At a stated term, to wit: The September Term, A.D., 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 26th day of January in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable: Paul J. McCormick, District Judge.

No. 34,928-C Bkey.

In the matter of

DEEP HOLE DRILLING CORP.,
a corporation, Debtor.

This matter coming on for hearing on Review of Referee's Order of November 26, 1941, pursuant to notice, filed December 30, 1941; C. S. Tinsman, Esq., appearing as counsel for the Consolidated Royalties Inc., et al., Petitioners on Review; Russell B. Seymour, Esq., appearing as counsel for Harry Ashton, Trustee:

Attorney Tinsman makes a statement in support and Attorney Seymour makes a statement in reply in opposition.

The Findings of Fact of the Referee in Bankruptcy are adopted, made the Findings of Fact of the Judge on Review and of the Court on Review, with an additional finding that for the period from the last payment of royalty for the month of Au-

gust, 1939, to September 23, 1939, no jurisdiction in the bankruptcy court has been established, and said court as to said period and as to the amount of interest or royalty or share, exclusively during said period, the bankruptcy court has no jurisdiction, and the Court adopts the Conclusions of Law of the Referee in Bankruptcy with modifications as to the amount of royalty interest to C. B. Callahan and Consolidated Royalties, Inc., for the period ending September 23, 1939, and such royalty interest and the amount of money impounded with the Standard Oil Company of California for said period to September 23, 1939, is the property of the Petitioners on Review and the debtor estate has no interest as to said property as to said period and the Bankruptcy Court has no jurisdiction of such portion of the funds impounded or on deposit with the Standard Oil Company of California, accordingly, with such modifications, [59] the order of the Referee dated November 26, 1941, is confirmed. Exceptions allowed to Petitioners on Review and the Trustee in bankruptcy, respectively. Counsel to prepare order thereon.

(M.Bk.24/911) [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Consolidated Royalties, Inc., a corporation, and C. B. Callahan hereby appeal to the Circuit Court of Appeals for the

Ninth Circuit from the Order on Petition for Review, entered in these proceedings on the 26th day of January, 1942.

FLEMING & ROBBINS and
C. S. TINSMAN,
By C. S. TINSMAN,
Attorneys for Appellants, Con-
solidated Royalties, Inc., and
C. B. Callahan.
Address: 639 South Spring
Street, Los Angeles,
California. [61]

Law Offices of
Fleming & Robbins
639 South Spring Street
Los Angeles, California

February 26, 1942

Hon. R. S. Zimmerman
Clerk of the U. S. District Court
Federal Building
Los Angeles, California.

Attention—E. L. Smith
Re: Deep Hole Drilling Corporation
Bankruptcy No. 34928-C

Dear Sir:

We are enclosing copies of Notice of the Appeal of Consolidated Royalties, Inc., and C. B. Callahan from the Order on Petition for Review entered in the above matter on January 26, 1942.

Will you please cause this Notice to be served upon the following attorneys:

Russell B. Seymour and George T. Goggin,
535 Citizens National Bank Building,
Los Angeles, California.

Lawler, Felix & Hall and Marcus Mattson and
William T. Coffin,
800 Standard Oil Building,
Los Angeles, California.

O. C. Sattinger,
1016 So. California Gas Co. Bldg.,
Los Angeles, California.

George Appell and Cyril Moss,
1006 Garfield Building,
Los Angeles, California.

If there are any additional documents needed or copies of documents in connection with the same, we will immediately provide the same.

Yours very truly,
FLEMING & ROBBINS,
By C. S. TINSMAN,
C. S. TINSMAN.

CST:ED

Encls.

[Endorsed]: Mailed E.L.S.

[Endorsed]: Filed Feb. 25, 1942. [63]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL.

This appeal arises in proceedings under Chapter XI of the United States Bankruptcy Act and is taken by Consolidated Royalties, Inc. and C. B. Callahan from an Order on Petition for Review of an order of the Referee in Bankruptcy which subordinated Appellants' right, title and interest in and to 12% of the oil produced, saved and sold, and in and to 12% of the net proceeds received from the sale of all gas, from Well #1, and in and to proceeds from the sale of oil in the hands of the Standard Oil Company, purchaser of said oil, which had accrued on and after September 1, 1939, to the claims of creditors, arising in the drilling of said Well #1, to the extent of \$4,000.00, and which order directed the Standard Oil Company of California, the purchaser of said oil, to pay over to the Trustee all proceeds from Appellants' said 12% of the oil until further order of the Court, and which order further restrained Appellants from prosecuting any action in any Court with respect to said production, unless leave of Court be [66] first obtained.

On the hearing of the Petition for Review of said order, the Honorable Paul J. McCormick, District Court Judge, modified the same to the extent of holding that royalties which had accrued prior to the date of the filing of the petition of the Debtor

under Chapter XI, on September 23, 1939, belonged to the Appellants, but affirmed the balance of said order and adopted the findings and conclusions of the Referee as the findings and conclusions of the Court, as so modified.

On their appeal from said order, Appellants intend to rely upon the following points, to wit:

I.

The Referee did not have jurisdiction under Chapter XI of the Bankruptcy Act to deprive Consolidated Royalties, Inc. and C. B. Callahan of their property in the summary manner attempted.

II.

The Court erred in making said order, in that, the findings were insufficient to justify the conclusion that Appellants' interest in said oil and the proceeds thereof in the hands of the Standard Oil Company were subordinate to the claims of creditors incurred in drilling said well to the extent of \$4,000.00, in that:

A. Appellants were conveyed 12% of the oil, which constitutes a conveyance of incorporeal interest in real property.

B. Appellants' ownership in said oil was acquired by conveyance executed more than four months prior to the filing of the petition under Chapter XI and after the well had been completed and on production and the findings disclose that insolvency resulted by reason of the extension of

credit by said creditors to the Debtor for the purpose of drilling Well #2.

C. Appellants' said interest was not subject to levy or sale under judicial process against the Debtor; was not transferrable by the Debtor; could not be considered a part of the [67] Debtor's estate.

III.

The Court erred in making said order, in that, said order is against the law, in that:

A. Said conveyance of the 12% of the oil was acquired more than four months prior to bankruptcy, after said well had been completed and on production, and was not a part of the debtor's estate.

B. The proceeds of said oil were purchased by Standard Oil Company at the well and by reason of the division order and said conveyance the same constituted funds in its hands for the benefit of Appellants.

C. The Court failed to follow the law of the State of California with respect to the property interest acquired in said oil by Appellants and the law of said state which declares that Appellants are not to be classified as joint adventurers with the bankrupt.

IV.

The Court erred in making said order, in that, it relied upon the case of *In re Lathrap*, 61 F. (2d) 37, which case Appellants believe to have been over-

ruled by the case of Laugharn vs. Bank of America, 88 F. (2d) 551, and the California courts have, since the Lathrap decision, determined the interest so acquired was an interest in real property and not an interest in personal property, which Appellants believe to have been the basis for the Lathrap case. Therefore, said case should no longer be followed.

Dated this 20th day of February, 1942.

FLEMING & ROBBINS and
C. S. TINSMAN

By C. S. TINSMAN

Attorneys for Appellants,
Consolidated Royalties, Inc.
and C. B. Callahan. [68]

Received copy of the within Statement of Points
Upon Which Appellants Intend to Rely on Appeal
this 25 day of February, 1942.

RUSSELL B. SEYMOUR and
GEORGE T. GOGGIN

By RUSSELL B. SEYMOUR E.H.

Attorneys for Harry L.
Ashton, Trustee.

[Endorsed]: Filed Feb. 25, 1942. R. S. Zimmerman, Clerk. [69]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

In the above entitled proceeding under Chapter XI of the Bankruptcy Act, the Appellants, Consolidated Royalties, Inc. and C. B. Callahan, designate the following as the portions of the record, proceedings and evidence to be contained in the record on appeal taken by said Appellants from the Order on Petition for Review, made on January 26, 1942:

1. Petition of Harry Ashton, as Trustee, on Order to Show Cause.
2. Order to Show Cause and Restraining Order dated May 17, 1940.
3. Answer of Respondents, Consolidated Royalties, Inc., a corporation, and C. B. Callahan, to Order to Show Cause and petition upon which it is based.
4. Stipulation of Facts upon such Order to Show Cause, Petition and Answer.
5. Memorandum Opinion of Samuel W. McNabb, Referee. [71]
6. Stipulation that Referee Hubert F. Laugharn might sign order.
7. Order re interests of Consolidated Royalties, Inc., and C. B. Callahan.
8. Petition for Review of the Referee's Order.
9. Referee's Certificate on Review.

10. Notice of Hearing of Petition for Review.
11. Order on Petition for Review dated January 26, 1942.
12. Notice of Appeal.
13. Bond for Costs on Appeal.
14. Statement of Points on Which Appellants Intend to Rely on Appeal.
15. This Designation of Contents of Record on Appeal.

The Clerk will please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit a Transcript of Record on Appeal in accordance with this designation.

Dated this 20th day of February, 1942.

FLEMING & ROBBINS and
C. S. TINSMAN

By C. S. TINSMAN

Attorneys for Appellants,
Consolidated Royalties, Inc.
and C. B. Callahan

Received copy of the within Designation of Contents of Record on Appeal this 25 day of February, 1942.

RUSSELL B. SEYMOUR and
GEORGE T. GOGGIN

By RUSSELL B. SEYMOUR E.H.

Attorneys for Harry L.
Ashton, Trustee.

[Endorsed]: Filed Feb. 25, 1942. R. S. Zimmerman, Clerk. [72]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 73 inclusive contain full, true and correct copies of: Petition of Trustee for Order to Show Cause; Order to Show Cause and Restraining Order; Answer Respondents Appellants to Petition and Order to Show Cause; Stipulation of Facts and Exhibits Attached Thereto; Memorandum Opinion of Referee McNabb; Stipulation that Referee Laugharn May Sign Order; Order re Interests of Appellants; Petition for Review; Referee's Certificate on Review; Notice of Hearing Petition for Review; Order of District Judge on Review; Notice of Appeal; Bond for Costs on Appeal; Statement of Points on Appeal; Designation of Contents of Record on Appeal; which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$10.85, which amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 13th day of March, A. D. 1942.

[Seal]

R. S. ZIMMERMAN

Clerk

By: EDMUND L. SMITH

Deputy.

[Endorsed]: No. 10088. United States Circuit Court of Appeals for the Ninth Circuit. Consolidated Royalties, Inc., a corporation, and C. B. Callahan, Appellants, vs. Harry Ashton, Trustee of the Estate of Deep Hole Drilling Corporation, a corporation, Bankrupt, Howard Supply Company, a corporation, I. Rude, Fred Lundberg, J. C. Hayward, and Standard Oil Company of California, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 16, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10088

CONSOLIDATED ROYALTIES, INC., a corpora-
tion, and C. B. CALLAHAN,

Appellants,

HARRY L. ASHTON, Trustee in Bankruptcy for
DEEP HOLE DRILLING CORPORATION,
a corporation,

Appellee.

STATEMENT OF POINTS RELIED UPON ON
APPEAL AND DESIGNATION OF REC-
ORD FOR PRINTING, AND STIPULA-
TION.

On their appeal herein, the Appellants state that they intend to rely upon the points mentioned in the Statement of Points upon which Appellants Intend to Rely on Appeal (Record p. 66) filed in the District Court and set forth in the record herein.

And the Appellants designate the following as those parts of the record necessary for the consideration of the points upon which the Appellants intend to rely on this appeal and for printing, to wit, all those parts of the record on appeal provided in the Appellants' Designation of Contents of Record on Appeal (Record p. 71) to be printed, with the exception of the cost bond on appeal, filed in the District Court and set forth in the record herein.

Dated this 13th day of March, 1942.

FLEMING & ROBBINS

By C. S. TINSMAN

Attorneys for Appellants.

It Is Hereby Stipulated that those portions of the record mentioned in the aforementioned designation shall constitute the record on appeal herein.

Dated this 13th day of March, 1942.

RUSSELL B. SEYMOUR and

GEORGE T. GOGGIN

By

Attorneys for Harry L.
Ashton, Trustee.

Received copy of the within Statement of Points Relied Upon on Appeal and Designation of Record for Printing, and Stipulation this 13th day of March, 1942.

RUSSELL B. SEYMOUR and

GEORGE T. GOGGIN

By RUSSELL B. SEYMOUR E.H.

Attorneys for Harry L.
Ashton, Trustee

[Endorsed]: Filed March 16, 1942. Paul P. O'Brien, Clerk.

No. 10088.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B.
CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of DEEP HOLE
DRILLING CORPORATION, a corporation, Bankrupt,
et al.,

Appellees.

BRIEF OF APPELLANTS.

FLEMING & ROBBINS and
C. S. TINSMAN,
1121 Los Angeles Stock Exchange Building, Los Angeles.
Attorneys for Appellants.



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No. 10088.
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B.
CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of DEEP HOLE
DRILLING CORPORATION, a corporation, Bankrupt,
et al.,

Appellees.

BRIEF OF APPELLANTS.

Preliminary Statement.

This appeal concerns a controversy in bankruptcy. Harry Ashton, as trustee of the estate of the Deep Hole Drilling Corporation, a bankrupt, obtained an order to show cause directed to appellants, and I. Rude, Howard Supply Company, Fred Lundberg, J. C. Hayward, Standard Oil Company of California and Union Oil Company of California, which order, among other things, required appellants to show cause why their respective interests in the oil produced from Well #1 should not be delivered to the trustee for benefit of creditors. This appeal concerns only the order made respecting the interest of appellants in and to the proceeds of producing

Well #1, which was operated by the bankrupt, as lessee, and appellee, both as receiver and trustee. The other respondents in the order to show cause and above named had interests in said producing well, but those interests are not involved in this appeal, with the possible exception of the Howard Supply Company and the Standard Oil Company, purchaser of the oil. Where appellee is referred to in this brief, the same applies only to Harry Ashton, trustee in bankruptcy for the estate of the Deep Hole Drilling Corporation. The principal questions involved are the relationship of appellants to the bankrupt, did the bankruptcy court exceed its jurisdiction in subordinating appellants' royalty interest to the rights of the general creditors, and if it had jurisdiction to do so, did the court err in making the order?

Jurisdictional Statement.

Deep Hole Drilling Corporation filed a petition for an arrangement with creditors under Section 322, Chapter XI, of the Bankruptcy Act (11 U. S. C. A. 722) on September 23, 1939. Appellee, Harry L. Ashton, was appointed receiver. The corporation was adjudicated bankrupt on April 22, 1940, and appellee was appointed trustee of the estate of said bankrupt.

Appellants are the owners of an overriding royalty interest aggregating 12% of the oil produced from real property on which was located Deep Hole Drilling Corporation Well #1, which was acquired on March 29, 1939, by conveyance from the debtor corporation. The Standard Oil Company of California is the purchaser of the oil of Well #1. It paid appellants their said royalty to August 31, 1939, but has impounded the same since

the filing of the original petition. On May 17, 1940, appellee filed his petition for an order to show cause [Tr. p. 3] and appellants were directed to show cause why the proceeds so impounded to April 30, 1940, amounting to \$846.08, should not be paid to him, as well as all other proceeds from the production of said well, and to show cause why it should not be decreed that appellants had no right, title or interest in and to the production of said well or the proceeds thereof, and why the rights of appellants should not be fixed and classified with respect to the rights of general creditors. [Tr. p. 7.] Appellants answered the petition [Tr. p. 9], alleging the facts by which appellants acquired title and reserving the objection theretofore made and overruled by the referee that the referee was without jurisdiction to summarily deprive appellants of their property.

A memorandum for an order was made by Referee McNabb on June 26, 1940. [Tr. p. 54.] However, the referee died prior to signing the order and it was stipulated between appellants and appellee that Referee Hubert F. Laugharn might sign the order. [Tr. p. 56.] The order, among other things, subordinated the 12% royalty interest of appellants in oil of Well #1 and in and to the proceeds of oil in the hands of Standard Oil Company of California to the claims of creditors arising in the drilling of Well #1, and directed the Standard Oil Company of California to pay over to the trustee all proceeds from said 12% until further order of a court of competent jurisdiction, and restrained appellants from prosecuting any action with respect to said proceeds without leave of court. Said order was signed by the referee on November 26, 1941. [Tr. p. 58.]

Within the time provided by law and on December 2, 1941, appellants served and filed their petition for review of the referee's order [Tr. p. 65] and said petition was heard, pursuant to notice of hearing on said petition for review [Tr. p. 70], on January 26, 1942, and the order of the District Court Judge thereon, from which this appeal is taken, was made and entered on January 26, 1942. [Tr. p. 72.]

Notice of appeal was duly served and filed herein on February 25, 1942 [Tr. p. 73] and an order approving the bond for costs on appeal was made by the District Court Judge on said 25th day of February, 1942.

Exclusive jurisdiction of proceedings in bankruptcy is vested in the Federal Courts.

Section 2(a), *Bankruptcy Act*.

The District Courts have original jurisdiction of all matters and proceedings in bankruptcy.

Section 41(19) Title 28, *U. S. C. A.*

The original petition herein was filed by the debtor under section 322 of the Bankruptcy Act (11 U. S. C. A. 722). Section 312(2) of the Bankruptcy Act (11 U. S. C. A. 712(2)) provides that the jurisdiction of the court shall be the same as though voluntary petition for adjudication had been filed and a decree had been entered at the time the petition under Chapter XI was filed. The debtor was adjudicated a bankrupt under the provisions of section 376(2) of the Bankruptcy Act and the pro-

ceedings were thereafter carried on pursuant to section 378(2) of the Bankruptcy Act (11 U. S. C. A. 788(2)). The provisions of Chapter I to VII of the Bankruptcy Act apply to proceedings under Chapter XI, where not inconsistent (Section 302, Bankruptcy Act (11 U. S. C. A. 702)).

This proceeding is a controversy arising in bankruptcy proceedings, being a separable issue between the appellants and the appellee concerning the right of the bankruptcy court to assume jurisdiction over appellants' property and concerns the right and title of the bankrupt's estate in and to appellants' overriding royalty interest.

Statutes under which the Circuit Court of Appeals is given appellate jurisdiction over this matter are as follows:

Section 316 of the Bankruptcy Act (11 U. S. C. A. 716) provides that where not inconsistent with the provisions of Chapter XI, the jurisdiction of the appellate courts shall be the same as in a bankruptcy proceeding.

Section 225, subdivisions (a) and (c), Title 28, U. S. C. A., grants to the Circuit Court of Appeals appellate jurisdiction of the District Court interlocutory orders and over all controversies in the District Court relating to bankruptcy.

Section 24(a) of the Bankruptcy Act invests the Circuit Court of Appeals with appellate jurisdiction over controversies arising in bankruptcy without an order of allowance when the matter involves in excess of \$500.00.

Statement of the Case.

Deep Hole Drilling Corporation acquired a leasehold estate on a parcel of land in Los Angeles County, the term of which was for a specified number of years and for so long as oil and gas should be produced in paying quantities. [Tr. p. 27.] It drilled and placed on production its Well #1 on February 5, 1939. On March 9, 1939, it applied for a permit to the California Corporation Commissioner to convey to appellants a royalty interest aggregating 12% of the oil produced from the land on which Well #1 was located. [Tr. p. 27.] On March 27, 1939, pursuant to the permit obtained, it conveyed to appellants such overriding royalty interest, which was stated as not being subject to operating costs of the well or lease. [Tr. p. 28.] The conveyance was recorded on March 30, 1939, in the recorder's office. The Deep Hole Drilling Corporation was solvent at that time. [Tr. p. 45.] Unpaid claims for the drilling of Well #1 amounted to approximately \$4,000.00, exclusive of the claim of Howard Supply Co., which agreed in writing not to interfere with the royalty interest of appellants. The Standard Oil Company of California was purchasing the oil from the well and has continued to do so. The debtor corporation also executed and delivered to appellants a division order directing the said oil purchaser to pay 12% of the proceeds from the oil directly to appellants, which order was stated to be irrevocable. This was accepted by the Standard Oil Company of California and royalties were paid to appellants through August, 1939. [Tr. pp. 29-

30.] The Deep Hole Drilling Corporation commenced drilling its Well #2. This well was located on property other than that covered by appellants' royalty interest [Tr. pp. 35, 47] and pursuant to the terms of another lease. The creditors of said corporation extended credit to the debtor corporation to enable it to drill its Well #2 and subsequent to the time the appellants acquired their said royalty interest. [Tr. p. 11.] Although, pursuant to the permit of the Commissioner of Corporations, the debtor corporation gave appellants an option to acquire royalty interests in other wells, these options were never exercised. Well #2 was never placed on production and the debtor corporation filed its petition for an arrangement with creditors on September 23, 1939. Harry L. Ashton was appointed receiver. The Standard Oil Company impounded the proceeds from appellants' 12% of the oil from September 1, 1939, on. The debtor corporation was adjudged bankrupt on April 22, 1940. Appellee was appointed trustee for the bankrupt's estate. On May 15, 1940, appellants filed an action in the Municipal Court of the City of Los Angeles against the Standard Oil Company to recover their unpaid royalty amounting to \$846.08. [Findings, Tr. pp. 59-62.]

On May 17, 1940, appellee filed a petition for an order requiring appellants to show cause why the Standard Oil Company should not be directed to turn over to him the proceeds from appellants' 12% of the oil then on hand and to be produced thereafter and why it should not be decreed that appellants had no right, title or interest in the

production and why appellants' rights should not be fixed and classified with respect to rights of general creditors and why they should not be restrained from instituting any action except in the bankruptcy court with respect to such proceeds. [Tr. p. 3.] The order to show cause was issued. [Tr. p. 7.] Appellants answered the petition and order to show cause reserving their objection to the jurisdiction of the referee to summarily deprive them of their property. [Tr. p. 9.] Appellants, still reserving their objection to referee's jurisdiction, and appellee entered into a written stipulation covering all material facts believed necessary for the consideration of the matter by the referee, including those hereinabove set forth. [Tr. pp. 25-54.] On June 26, 1940, the referee made his memorandum for an order and directed appellee to prepare the same. [Tr. p. 54.] Referee McNabb was taken ill and passed away before the order could be presented to him. It was thereafter stipulated between the appellants and appellee that Referee Hubert F. Laugharn might sign the order. [Tr. p. 56.] The order was so signed on November 26, 1941, and found the facts to be as stipulated, including the fact that appellants did not at any time participate in the conduct, management or business of the bankrupt corporation and that it had not been shown that any creditor relied upon appellants' personal credit in furnishing labor or materials; that the 12% of the oil produced from Well #1 had been conveyed to appellants after the well was on production, when the bankrupt was solvent, and more than five months prior to filing of its

petition for an arrangement with creditors. [Tr. pp. 59-62.] As conclusion of law the referee concluded that appellants' rights and interests in the oil and in and to the net proceeds from gas produced and sold from Well #1 were subject and subordinate to the rights and interest of the trustee to the extent of \$4,000.00 unpaid indebtedness incurred in drilling Well #1 and all proceeds from appellants' 12% of the oil were the property of trustee free of any claim of appellants [Tr. p. 63] and the order provided that said 12% of the oil and of the proceeds therefrom in the hands of the Standard Oil Company in the amount of \$846.08, to April 30, 1940, and the proceeds after April 30, 1940, was subject to unpaid creditors' claims arising in the drilling of Well #1, to the extent of \$4,000.00. Said order further directed the Standard Oil Company to pay such proceeds to the trustee and restrained appellants from prosecuting any action with respect to such proceeds unless leave of the court be first obtained. [Tr. pp. 63-64.] Upon the hearing on petition for review, the District Court Judge modified the order to the extent of decreeing that appellants were entitled to the proceeds of oil in the hands of the Standard Oil Company covering the period from September 1, 1939, to September 23, 1939, the date the petition was filed by the bankrupt under Chapter XI of the Bankruptcy Act, but otherwise adopted, approved and confirmed the findings of fact and conclusions of the referee and affirmed the order as modified. [Tr. pp. 72-73.] Exception to said order was taken by appellants and was noted. [Tr. p. 73.]

The questions invoked are:

(1) Did the referee in bankruptcy have jurisdiction to summarily deprive appellants of their 12% of the oil from Well #1 and proceeds thereof which were in the hands of the purchaser of the oil?

(2) Was appellants' oil and the proceeds thereof which was in the possession of the purchaser of the oil and which had accrued between the filing of the petition on September 23, 1939, and November 26, 1941, the date of the referee's order, subject to the jurisdiction of the bankruptcy court?

(3) Do creditors and the trustee in bankruptcy of the Deep Hole Drilling Corporation have any right, title or interest in and to appellants' 12% of the oil from Well #1, which was lawfully conveyed while the company was solvent and more than five months prior to the filing of the petition under Chapter XI?

(4) Has the case of *In re Lathrap*, 61 F. (2d) 37 (9th Cir.) been overruled by *Laugharn v. Bank of America*, 88 Fed. (2d) 551 (9th Cir.)? Is the *Lathrap* case to be followed in this matter where the facts are different and the rule of property upon which it was based has been declared by California courts not to be a rule of property in this state?

Specifications of Error Relied on.

Statement of points upon which appellants intend to rely upon appeal are set forth at pages 76-79 and 84 of the transcript. Each of said points is relied upon by appellants and such points are as follows:

I.

The referee did not have jurisdiction under Chapter XI of the Bankruptcy Act to deprive Consolidated Royalties, Inc. and C. B. Callahan of their property in the summary manner attempted.

II.

The court erred in making said order, in that, the findings were insufficient to justify the conclusion that appellants' interest in said oil and the proceeds thereof in the hands of the Standard Oil Company were subordinate to the claims of creditors incurred in drilling said well to the extent of \$4,000.00, in that:

A. Appellants were conveyed 12% of the oil, which constitutes a conveyance of incorporeal interest in real property.

B. Appellants' ownership in said oil was acquired by conveyance executed more than four months prior to the filing of the petition under Chapter XI and after the well had been completed and on production and the findings disclose that insolvency resulted by reason of the extension of credit by said creditors to the debtor for the purpose of drilling Well #2.

C. Appellants' said interest was not subject to levy or sale under judicial process against the debtor; was not transferable by the debtor; could not be considered a part of the debtor's estate.

III.

The court erred in making said order, in that, said order is against the law, in that:

A. Said conveyance of the 12% of the oil was acquired more than four months prior to bankruptcy, after said well had been completed and on production, and was not a part of the debtor's estate.

B. The oil was purchased by Standard Oil Company at the well and by reason of the division order and said conveyance the same constituted funds in its hands for the benefit of appellants.

C. The court failed to follow the law of the State of California with respect to the property interest acquired in said oil by appellants and the law of said state which declares that appellants are not to be classified as joint adventurers with the bankrupt.

IV.

The court erred in making said order, in that, it relied upon the case of *In re Lathrap*, 61 F. (2d) 37,, which case appellants believe to have been overruled by the case of *Laugharn v. Bank of America*, 88 F. (2d) 551, and the California courts have, since the Lathrap decision, determined the interest so acquired was an interest in real property and not an interest in personal property, which appellants believe to have been the basis for the Lathrap case. Therefore, said case should no longer be followed.

Summary of Argument.

POINT I. The referee did not have jurisdiction to summarily deprive appellants of their property.

A. 12% of the oil and the proceeds thereof was and is the property of appellants.

B. The proceeds of said 12% were in possession of the Standard Oil Company for account of appellants payable to appellants in accordance with the irrevocable division order and was not in possession of the bankruptcy court or the trustee in bankruptcy.

POINTS II, III & IV. under specifications of error above are hereby referred to for a summary of the argument in connection with those points. In addition appellants contend under Point IV that the facts of the *Lathrap* case are so different from those in this matter that the decision in said case cannot be applied in any event.

ARGUMENT.

POINT I.

The Referee Did Not Have Jurisdiction to Summarily Deprive Appellants of Their Property.

A. The 12% of the oil produced from the land was appellants' property and was not subject to jurisdiction of the bankruptcy court.

1. The assignment of the 12% overriding royalty interest in the oil to be produced from the land was a conveyance of an incorporeal interest in real property, which vested in appellant's title to 12% of the oil.

In the case of *La Laguna Ranch Co. v. Dodge*, 18 A. C. 107; 114 Pac. (2d) 351, decided June 20, 1941, the Supreme Court of California was called upon to define the interest of an overriding royalty holder. The court discussed previous California cases and stated, that where "the assignee does not intend to attempt operation himself and is given no right of entry for such purpose, those rights are held by the operating lessee and the holders of royalty interests contemplate nothing more than the receipt of their share of the oil and gas production" . . . "The purpose and scope of all such royalty interests are so similar that all should be considered equally to be incorporeal interests in real property subject to the same requirements and protected by the same safeguards," and "Defendant's overriding royalty interests therefore were interests in real property."

The Supreme Court of Wyoming in the case of *Denver Joint Stock Land Bank of Denver v. Dixon*, 122 P. (2d) 842, decided on February 24, 1942, carefully considers the

California cases, including *Callahan v. Martin*, 3 Cal. (2d) 110, and the *La Laguna Ranch Co.* case referred to, as well as other California cases. In this case the court was called upon to decide whether oil royalty interests were covered by a mortgage or whether such rights were mere personal rights in oil after production and hence not covered by the mortgage. The court stated,

“The right to a royalty interest in oil does not merely attach after the oil has been severed from the ground and has become personal property. It is not merely rent issuing out of the annual produce of the land. It goes further than that. The right, extending as it does to oil which is to come from particular land, extends to and is necessarily connected with the corpus of the land, and is, accordingly, a right which exists in the oil which still is in place, inchoate though it may be, follows it as it comes from the ground and still is attached after it has become personal property. To call it personal property is but emphasizing a particular stage of the right on its way to fulfillment. It ignores that it is a right which necessarily extends to part of the corpus of the land. If it were possible to divide the oil in the ground in such a manner that the land in which the royalty portion would be found could, together with the royalty interest, be delivered to the owner of the royalty interest intact, then clearly it would be considered as real property. That is not possible, but in theory the equivalent of that right, aside from bringing the oil to the surface, is substantially the right of the owner of a royalty interest in particular land. The fact that real property, when severed, becomes under our terminology and classification, personal property, should not obscure the real nature of the right.”

This court held the royalty rights to be real and not personal property which were covered by the mortgage.

The latest case on this subject is that of *Taylor v. Odell*, 50 A. C. A. 158, decided by the District Court of California on February 25, 1942, which, after quoting from the case of *La Laguna Ranch Co.*, *supra*, stated:

“The moneys paid plaintiffs from the sales of the well’s production was received as an incident to ownership the same as rent from any real property. The assignment of the royalty interest in the well of the Two and One Oil Company vested in plaintiffs an interest in the oil produced by that company. When the money for production was received by Two and One, it was held in trust for plaintiffs if the company had knowledge of the defendant’s assignment.”

See also the case of *Laugharn v. Bank of America*, 88 F. (2d) 551.

2. Said overriding royalty interest was conveyed to appellants more than four months prior to bankruptcy. It was not subject to levy or sale under judicial process, nor was it transferable by the bankrupt. Therefore it cannot be considered a part of the bankrupt’s estate.

“The trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors or which, prior to the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.”

Moore v. Bay, 284 U. S. 4; 52 Sup. Ct. 3; 76 L. Ed. 133.

It therefore appears that the trustee in bankruptcy did not have title to property which would not come under the above classification.

In the case of *In re Seiffert*, 18 F. (2d) 444, the court stated as follows:

“The principal test seems to be whether the property in question, prior to the filing of the petition, could by any means have been transferred by bankrupt, or whether it might have been levied upon and sold under judicial process against him. Bankruptcy Act, Sec. 70(a). (Comp. St. sec. 9654).”

3. Property in which bankrupt has no ownership does not become a part of the bankrupt's estate, even though it is in the possession of the bankrupt.

This rule of law is set forth in the case of *Lynch v. Lentz*, 10 F. (2d) 561, where the trustee in bankruptcy sought to recover possession of property which had been in the hands of the bankrupt, but which had been taken in a claim and delivery action. The question was whether the property was an asset of the estate in bankruptcy. The court stated,

“It must be conceded under the law that property found in the hands of the bankrupt as to which the latter possesses no ownership right of any quality whatsoever, does not become part of the bankrupt estate.”

It is respectfully submitted, therefore, that appellants are the owners of 12% of oil in the real property upon which Well #1 is located and in and to the proceeds of said oil now in the hands of Standard Oil Company, and that such did not become part of the bankrupt's estate subject to distribution to creditors as such.

B. Chapter XI gives the court jurisdiction over the debtor's property only.

1. Section 311 of the Bankruptcy Act gives the court jurisdiction over the debtor's property only.

Sec. 331, *Bankruptcy Act*, 11 U. S. C. A. sec. 711.

2. Section 312(2) of the Bankruptcy Act provides that the jurisdiction, power and duties of the court, when not inconsistent with the provisions of Chapter XI, shall be the same where a petition is filed under section 322 of the Act as if a voluntary petition for adjudication had been entered.

Sec. 312, *Bankruptcy Act*, 11 U. S. C. A., sec. 712.

This section cannot broaden the jurisdictional limitations of Chapter XI, where such would be inconsistent with such chapter. That chapter deals only with the debtor and his property. Between September 23, 1939, when the petition was filed, and April 22, 1940, the date of adjudication, the purchaser of the oil had accumulated and held in its possession for appellants' account their 12% of the proceeds of the oil from Well #1, amounting to \$846.08.

3. Section 332 of the Bankruptcy Act, providing that a receiver may be appointed for the property of the debtor, is not authority for appointment of a receiver for appellants' property.

Sec. 332, *Bankruptcy Act*, 11 U. S. C. A., sec. 732.

4. Section 343 of the Bankruptcy Act gives a receiver power to operate the business and manage the property of the debtor, not the property of others.

Sec. 343, *Bankruptcy Act*, 11 U. S. C. A. sec. 743.

The appellee, as receiver, between September 23, 1939, and the adjudication had no interest in or title to property of appellants in the hands of the Standard Oil Company.

C. Summary proceedings will not lie as to appellants' property, which is not in possession of the bankruptcy court.

1. The proceeds of appellants' oil were in the hands of the Standard Oil Company and under the irrevocable division order were payable to appellants. Under such circumstances a plenary suit must be brought by the trustee.

The Supreme Court of the United States, in the matter of *Bobbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, sets forth this rule as follows:

"There are two classes of cases arising under the act of 1898, and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.

In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated."

In the case of *Merritt v. Long*, 93 F. (2d) 257 (9th Cir.) a farmer had filed a petition under section 75 of the Bankruptcy Act and claimed ownership to cattle in the possession of appellee, who also claimed ownership. Ob-

jection to the jurisdiction of the referee to try title to property was made and the referee ordered the property returned to the bankrupt. This court upheld the contention of the appellee on appeal, stating:

“The procedural rights of a party claiming to be the owner of property are not abridged by the bankruptcy of his adversary, and in the absence of such party’s consent the bankruptcy court has no jurisdiction to determine his rights in a summary way. Section 23(b), Bankr. Act 1897 (11 U. S. A. C. sec. 46(b)). Until the appellant petitioned for an adjudication of her claim to the cattle and obtained the order to show cause, there was no summary proceeding to which consent could be given or withheld; and at that juncture the appellee promptly objected to the jurisdiction.

Appellee’s claim of adverse title was based upon a transfer prior to bankruptcy, and came within the first of the two classes of cases distinguished by the Supreme Court in *Babbitt v. Dutcher*, 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969.”

In the case of *Ramish, Inc. v. Laugharn*, 86 F. (2d) 686 (9th Cir.) the trustee obtained an order to show cause why an assignment of $9\frac{3}{8}\%$ royalty in land was not invalid and why an order should not be made requiring appellee to turn over to the trustee all income, derived from such royalties. The transfer of the royalty to appellant’s predecessor had occurred prior to bankruptcy. The district court confirmed an order of the referee directing the appellant to pay over such proceeds to the trustee. The Circuit Court said that the time to determine adverse

claims was as of the date of the filing of the petition and quoted with approval from *Mueller v. Nugent*, 184 U. S. 1, 15; 22 S. Ct. 269; 46 L. Ed. 405, as follows:

"It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt's estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit."

The court held that the trustee should seek his relief in a plenary suit.

See also *In re Greenbaum & Sons*, 6 F. S. 245, and *Marcell v. Engebretson*, 74 F. (2d) 93.

2. Where a fund has been set apart for the payment of an obligation or claim of obligations or a fund in the hands of third persons has been so designated as to require the latter to make a payment out of it to a person, the general rule is that the person for whose benefit the fund was so set apart or designated acquires a right to have it applied as directed, which right will be given a preference over the rights of other creditors in case of the debtor's insolvency.

In the matter of *In re Latex Drilling Co.*, 11 F. (2d) 373, the bankrupt was the operating lessee. The oil was delivered to and purchased by Standard Oil Company. The company had given the purchaser an order to pay a portion of the proceeds to Edwin Jones. The trustee in bankruptcy sought to obtain possession of these proceeds

and the referee ordered the Standard Oil Company to pay the same to the trustee. The court held as follows on appeal:

“In circumstances like the present case, I think the opponent falls into the category of an adverse claimant, and the controversy becomes one arising in bankruptcy, as distinguished from those growing *out of* bankruptcy and as to which the jurisdiction of the court is determined according to general rules and particularly section 23 of the Bankruptcy Act (Comp. St. sec. 9607). If the defendant be in possession of the property or funds which he claims and it is found that he has colorable title thereto, he has the right to insist that he be sued at his domicile, in a proper court, state or federal. And I think the conditions are analogous where the funds are held by a third person who asserts no interest therein save the desire to pay them to the one lawfully entitled to receive them.”

In the case of *Title Ins. etc. Co. v. Williamson*, 18 Cal. App. 324, the contract price for the construction of a building was deposited with the plaintiff corporation with instruction to pay the final installment to Williamson upon completion. Williamson made a written order upon the plaintiff to pay the same to Carpenter and Biles in payment of the material debt. Before the money was paid, an execution was levied. The trial court held that an assignment of the debt was worked by the written order. The appellate court stated,

“It is very clear from the circumstances surrounding the transaction that had the money been paid over to the Carpenter and Biles Company, Williamson would have had no legal right to demand that the same be delivered by that company to him, or diverted

in any way from its possession. As it was said in *McIntyre v. Hauser*, 131 Cal. 11 (63 Pac. 69): ‘In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.’ ”

The Supreme Court on petition for hearing, approved the decision and stated that the assignment of which the creditors had notice operated to perfect the transfer of title to the fund.

Again, in the case of *McKay v. Sec. First National Bank of L. A.*, 35 Cal. App. (2d) 349, the appellate court was called upon to determine the rights of assignee in a one-third interest in oil royalties given to pay a promissory note. In addition to the note, an order was made directing the depository to pay such sum to the creditor. The court held that the note was in truth a partial assignment of a fund created by the oil royalties, and stated:

“A partial assignment of a designated fund and a contemporaneously accepted order to the depository for its payment, and no rights senior to those assigned having been established to any portion of the one-third interest conveyed by decedent to him, plaintiff’s title to the portion assigned to him is indefeasible.”

A rehearing was denied by the Supreme Court.

The rights of an assignee in and to trust funds have been held superior to those of general creditors.

Steel Cities Chemical Co. v. Virginia Carolina Chemical Co., 7 F. (2d) 280.

Also see the following cases:

Curtis v. Walpole Tire & Rubber Co., 134 C. C. A. 140; 218 F. 145;

Johnson v. Root Mfg. Co., 241 U. S. 160; 60 L. Ed. 934; 36 S. Ct. 520; 36 A. B. R. 764;

Sexton v. Kessler Co., 225 U. S. 90; 56 L. Ed. 795; 32 S. Ct. 657; 28 A. B. R. 85;

Merillat v. Hensey, 221 U. S. 333; 55 L. Ed. 995; 31 S. Ct. 575; 36 L. R. A. (N.S.) 370; Ann. Cas. 1912-D, 497;

In re Interborough Cons. Corp., C. C. A. (2d) 288 Fed. 334;; 32 A. L. R. 932; 2 A. B. R. (N.S.) 407.

In our case, in addition to the recorded conveyance of 12% interest in the oil to be produced, appellants were given an irrevocable division order for the payment of the proceeds of such 12% in the hands of the Standard Oil Company direct to the appellants. Appellants respectfully submit that such interest is not part of the bankrupt's estate, nor subject to the claims of creditors; that the proceeds of the oil in the hands of the purchaser of the oil were not in possession of the trustee in bankruptcy, but were held in trust for the benefit of appellants, and that the bankruptcy court therefore did not have jurisdiction to order the payment of such proceeds to the trustee in bankruptcy.

POINT II.

The Court Erred in Making the Order. The findings Do Not Support the Order Subordinating Appellants' Ownership in the Oil and Proceeds to Creditors of Deep Hole Drilling Corporation, but on the Contrary Establish Appellants' Ownership of an Overriding Royalty Interest of 12% of the Oil Produced From Well No. 1 and the Proceeds Thereof in the Hands of the Standard Oil Company, Free of the Claims of Creditors or Appellee.

A. The conveyance from Deep Hole Drilling Corporation to appellants were conveyances of an interest in the oil itself and constituted a conveyance of an incorporeal interest in the land. [Form of conveyances at Tr. pp. 19-23 and pp. 38-40.]

La Laguna Ranch v. Dodge, supra;

Laugharn v. Bank of America, supra;

Taylor v. Odell, supra;

Denver Joint Stock Land Bank of Denver v. Dixon, supra.

B. The conveyances were executed March 27, 1939, and recorded March 30, 1939, more than four months prior to filing the petition under Chapter XI, September 23, 1939, by the Deep Hole Drilling Corporation.

C. The debtor was at that time solvent. [Tr. p. 45.]

D. The creditors extended additional credit to Deep Hole Drilling Corporation for the drilling of Well #2, which constituted the substantial indebtedness of the bankrupt at the time the petition was filed. [Tr. p. 62, para-

graph 12.] This credit was extended with actual or constructive notice and knowledge of appellants' title to the oil being produced, from Well #1, as the conveyance had been recorded. (Sec. 1213, Civil Code of California.) Appellants' interests were incorporeal interests in real property, subject to the same requirements and protected by the same safeguards. (*La Laguna Ranch Co .v. Dodge, supra.*)

E. The facts establish that appellants were not joint adventurers or co-adventurers with the bankrupt, as found by referee. [Tr. p. 55.]

1. By the Stipulation of Facts [Tr. p. 31] it was stipulated that appellants did not at any time, nor have they ever, participated in the conduct, management or business of Deep Hole Drilling Corporation. That the trustee had not shown any creditor of the bankrupt delivered material to the bankrupt or performed labor for bankrupt upon appellants' personal credit. These facts were also found to be true by the court. [Tr. p. 62.]

Appellants were not, therefore, joint or co-adventurers or partners with the Deep Hole Drilling Corporation.

Spier v .Lang, 4 C. (2d) 711, 715;

Theriot v. Plane, C. C. A. (9th Cir.). Decided March 31, 1942, Case No. 9910.

The Deep Hole Drilling Corporation assigned to appellants a fractional share of the oil and gas produced in the form of an overriding royalty.

“In any case the intention of the parties is controlling and in the absence of a clear indication that

such was the intent, the court will not construe royalty interests created for the duration of a specific oil and gas lease as granting the right to enter upon the land in question for the purpose of carrying on oil production or as creating a tenancy in common in the profit of a prendre for that purpose.” (*La Laguna Ranch Co. v. Dodge, supra.*)

No intention to establish a joint operation or a cotenancy was proved by the trustee. Certainly none is disclosed by the assignments or other facts.

The facts establish that appellants acquired a fractional interest in the oil for a valuable consideration after the well had been drilled and on production for more than thirty days and was averaging over 400 barrels per day. [Tr. p. 43.] Appellants were assured by the Deep Hole Drilling Corporation that the obligations outstanding against Well #1 would be paid from the \$11,400.00 received from the sale of the royalty interests to appellants, with the exception of the claim of Howard Supply Company [Tr. p. 31] who had waived its right to interfere in any way with the said royalty interest. [Tr. p. 46.] These facts were all ascertained and relied upon at the time appellants acquired their interest and under these circumstances they can hardly be placed in the category of speculators, but purchased a royalty interest, the value of which was definitely ascertained. The debtor's obligations totaled only \$3,964.00 exclusive of Howard Supply Co. The company was then solvent. It had \$6,650.00

cash in the bank and \$8,000.00 due to it for oil from Well #1 from the Standard Oil Company. This was disclosed by the verified application to the Commissioner of Corporations, particularly Exhibit "G," which was thereto attached. [Tr. pp. 33-54. See p. 45.]

Appellants respectfully submit that no joint adventure or co-adventure relation in the drilling or operation of Well #1 or otherwise may logically be concluded from such facts, but on the contrary the law requires the conclusion that appellants acquired an ownership in the oil, which should be protected.

2. It appears from the facts of the case that unpaid creditors of Well #1 were known on February 5, 1939, the date the well was placed on production. There were funds available for payment of their claims, yet these creditors continued to extend credit to the Deep Hole Drilling Corporation for more than seven months thereafter and to extend other and additional credit for drilling another well, which resulted in the eventual bankruptcy of the corporation. It is neither equitable nor just to permit these creditors or the trustee in bankruptcy to reach back over the months and say that the bankruptcy court must protect such creditors and in doing so ignore the vested property rights of appellants, who acquired their interest in the oil, for value, long prior to bankruptcy.

The twelve per cent overriding royalty interest in the oil and gas produced from Well #1 conveyed to appellants was an interest in land and was not a mere personal right

enforceable only against the Deep Hole Drilling Corporation.

Emerson v. Little Six Oil Co., 3 F. (2d) 265. (Certiorari denied 268 U. S. 700, 69 L. Ed. 1165);

Wortley v. Wood-Callahan Oil Co., 17 A. C. 803; 112 Pac. (2d) 226.

As was said by the Supreme Court of Texas in *Sheffield v. Hogg*, 124 Tex. 290; 77 S. W. (2d) 1024,

“Were the stability furnished by these rules (holding royalty interests to be real property) withdrawn and the fundamental contracts on which the oil business so largely rests be adjudged by the Supreme Court to create mere rights in personality at some uncertain date in the future, the structure of the business would be seriously, if not fatally, jeopardized.”

The creditors of Deep Hole Drilling Corporation cannot stand in a more favored position than the corporation itself where the conveyance to appellants took place long prior to bankruptcy and for value. It is respectfully submitted that the court erred in subordinating appellants' interest in the oil and proceeds thereof in the hands of the Standard Oil Company to the claims of such creditors. A mere personal claim against a bankrupt might be postponed to general creditors' claims, but the appellants' title to the oil and the proceeds thereof may not be so treated. Such interest in the oil is not a part of the bankrupt's estate. It was not subject to levy or sale under judicial process and it was not transferrable by the bankrupt.

POINT III.

The Court Erred in Making Said Order and Said Order Is Against the Law.

A. Appellants' twelve per cent overriding royalty interest in oil produced from the land on which Well #1 was located was not part of the bankrupt's estate.

B. The oil was purchased at the well by Standard Oil Company. [Tr. p. 27.] Title passed to the said purchaser upon delivery [Tr. p. 27], subject to the irrevocable division order and the conveyances of the oil to appellants. The proceeds from the oil were therefore held by the Standard Oil Company for appellants' benefit. (See authorities under Point I, C(2).

In the case of *Taylor v. Odell*, 50 A. C. A. 158, at page 167, the court had this to say with respect to an overriding royalty:

“Such royalty was an incorporeal interest in real property ‘subject to the same requirements and protected by the same safeguard’ (*La Laguna Ranch Co. v. Dodge, supra*) * * * The assignment of the royalty interest in the well of the Two and One Oil Company vested in plaintiffs an interest in the oil produced by that company. When the money for production was received by Two and One, it was held in trust for plaintiffs if the company had knowledge of defendants’ assignment” and

“As long as he held their moneys he was trustee for plaintiffs for the moneys in his custody.”

C. The Court failed to follow the law of the State of California with respect to the property interest acquired in said oil by appellants.

1. The Court followed the case of *In re Lathrap*, 61 F. (2d) 37, in effect held that the interest conveyed was personal property and therefore appellants had no title to the oil itself. The cases heretofore cited establish that the interest conveyed was an interest in real property and is subject to the safeguards of such conveyances.

2. The Court further concluded that appellants were joint adventurers or co-adventurers in producing Well #1, whereas the Supreme Court of California has determined that where no control was exercised over the lessee by those interested in the proceeds of oil and that material and labor were not furnished upon their personal credit, no joint adventure or partnership existed. (*Spier v. Lang, supra.*)

3. Rules of property and of law established by the California courts must be followed by the Federal Courts.

Laugharn v. Bank of America, 88 F. (2d) 551.

POINT IV.

The Court Erred in Making Said Order, in That, It Relied Upon the Case of *In re Lathrap*, 61 F. (2d) 37, as Authority for Subordinating Appellants' Interest in the Oil and the Proceeds Thereof to the Claims of Creditors.

A. The *Lathrap* case has been overruled by the case of *Laugharn v. Bank of America*, 88 F. (2d) 551.

The *Lathrap* decision held that the royalty per cent holders did not acquire any interest in the oil itself, that the assignments gave them merely the right to participate in proceeds from the sale of the oil; that the assignment was measured in money, not in oil; that certificate holders therefore became participants in a common enterprise similar to stockholders or investors who must stand aside upon liquidation until creditors have been paid.

After the *Lathrap* decision the Supreme Court of California, in the case of *Callahan v. Martin*, 3 Cal. (2d) 110; 43 Cal. (2d) 788, 101 A. L. R. 871, held that the lessee under an oil and gas lease had an interest in real property capable of assignment or conveyance. Other cases followed to the effect that assignments of lessee's royalty interests were conveyances of an interest in real property.

Thereafter in the case of *Laugharn v. Bank of America*, 88 F. (2d) 551 (9th Cir.) the Circuit Court of Appeals was called upon to determine the nature of an assignment of a lessee's interest in oil being produced, given as security for a loan. The Court said, at page 553 of the decision, as follows:

“As the law then stood, this court was presented with two cases involving the nature of royalty inter-

est holder's right whose interest was acquired from a lessee in an oil and gas lease. It was held that neither the owner nor the lessee had any present title to oil in place, and therefore the assignment by the lessee did not convey the present title. *In re Lathrap* (C. C. A. 9), 61 F. (2d) 37; *Bank of America Nat. Trust & Savings Ass'n v. Fisher* (C. C. A. 9), 61 F. (2d) 53."

"Thereafter, the Supreme Court of California, in *Callahan v. Martin*, 3 Cal. (2d) 110, 43 P. (2d) 788, 792, 101 A. L. R. 871, considered the same issue and held that after an oil and gas lease, both the lessor and the lessee had an interest in real property capable of assignment or conveyance."

"If previous decisions of this court, in the absence of state court decisions, established a rule of property, which was later changed by state statute, can it be argued that this court must follow its previous decisions? If the law of the state is established either by statute or judicial decisions, this court must follow the law of property as determined by the highest state court. Therefore, we must and do overrule the prior decisions of this court in so far as they are inconsistent with the settled law of California as adjudged by the California courts. On this basis we hold the assignments in the instant case to be conveyances of an interest in real property, and not to be executory contracts."

Since the above decision, the California Supreme Court in the case of *La Laguna Ranch Co. v. Dodge, supra*, on June 20, 1941, established definitely that the assignment of an overriding royalty interest in oil and the proceeds thereof carved out of a leasehold estate by the lessee, conveys an incorporeal interest in real property.

The court stated that the holders of such royalty interests contemplated nothing more than the receipt of their share of the oil and gas production and that the lessee conveyed merely a fractional share of the oil and gas produced in the form of an overriding royalty.

In the case of *Schiffman v. Richfield Oil Co.*, 8 Cal. (2d) 211, at page 227, the California Supreme Court stated,

“The subject matter of royalty assignments is specific—an undivided interest in the oil to be produced under a specific lease or from a specific well during the term of the lease, or an interest in the proceeds of such oil. A transferee of the leasehold with notice on broad equitable principles must recognize the royalty holders interest in oil produced by such transferee.”

and on page 228,

“The royalty assignees interest in the proceeds must be upheld whether the assignment is of oil to be produced, saved and sold or of proceeds of such oil.”

It is respectfully urged that by reason of the above cited cases the reasoning of the *Lathrap* case relegating overriding royalty interest holders to the category of joint adventurers or investors in a common enterprise on the ground that the assignments merely permitted the holder to participate in profits of the enterprise, can no longer apply and that the said case has been overruled by the *Laugharn* case.

B. Even though it should be held that the *Lathrap* case has not been overruled, the facts upon which that decision was based are materially at variance with the facts of this matter, in that,

1. In our case the well had been completed and was on production for many weeks before appellants acquired their royalty interests. In the *Lathrap* case the royalty interests were sold to provide funds for the drilling of the well.

2. In our case the assignment or conveyance was of an “overriding royalty interest of 12% of the oil produced, saved and sold” and without deduction of operating costs. In other words, the interest was measured in oil. In the *Lathrap* case the interest sold was 1% of the gross proceeds received from the sale of 100% of the oil. The interest was measured in money, not in oil.

3. In our case the assignments were recorded. Creditors had notice of the conveyance, but, disregarding this, continued to extend credit to the debtor as to the unpaid balance of drilling costs of Well #1 for seven months after it was placed on production, and furnished additional material and labor in other enterprises for the debtor, which resulted in the eventual bankruptcy of the debtor.

4. In our case, irrevocable division orders were obtained directing the Standard Oil Company to pay the proceeds from appellants’ said 12% of the oil to appellants, which was accepted and done until the debtor’s petition was filed herein. In the *Lathrap* case the court stated there had been no oil sold to the holders of the assignments and no trust or special fund had been created for their benefit.

5. In our case the stipulated facts do not permit a finding of joint, co-adventure or partnership relation between appellants and the bankrupt.

It is respectfully submitted that the court erred in following the *Lathrap* case and that that decision is not applicable to the facts of our case, for the reasons above stated. The company was solvent when appellants purchased their share of the oil to be produced. The creditors could have refused to extend credit to the debtor after this conveyance, but chose to take their chance of payment from continued business of the debtor and production from other wells. Appellants purchased an interest in the oil then being produced from the land on which Well #1 was located for \$11,400.00. Their interest was definitely ascertained and measured. The only speculation, if any, to be charged to them was that of the length of time oil would be produced from the well and the quantity thereof.

Appellants submit that there is no justification in permitting creditors to receive the appellants' share of the oil and the proceeds thereof which was purchased in good faith, not as a speculation and long prior to bankruptcy and at a time the company was solvent, when those creditors continued to extend credit to the debtor for so many months with full knowledge of appellants' ownership of 12% of the oil.

Conclusion.

Appellants urge that the order from which this appeal is taken should be reversed and that the restraining order should be dissolved.

Respectfully submitted,

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Attorneys for Appellants.

No. 10088.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B.
CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of DEEP HOLE
DRILLING CORPORATION, Bankrupt, *et al.*,

Appellees.

BRIEF OF APPELLEE.

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FILED

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PAUL P. O'BRIEN,

CLERK

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DRILLING CORPORATION, Bankrupt, *et al.*,

Appellees.

BRIEF OF APPELLEE.

Preliminary Statement.

This brief is presented solely on behalf of Harry Ashton as trustee of the estate of Deep Hole Drilling Corporation, bankrupt.

Statement of the Case.

The statement of the case made by appellants fully and correctly states the facts, with the following exceptions:

The trustee does not have assets or funds sufficient to pay in full the claims of creditors arising from the drilling of said wells No. 1 and No. 2, or either of them. [Tr. p. 62.]

That, in addition to the \$4000.00 in unpaid obligations incurred in drilling said Well No. 1, the substantial balance of provable obligations of the bankrupt estate are claims of Howard Supply Company and other claims resulting from the drilling of said well No. 2 subsequent to the acquisition by appellants of their 12% royalty interest in well No. 1. [Tr. p. 62.]

Simultaneously with the purchase of the 12% in well No. 1 the appellants acquired an option agreement from the bankrupt whereby they could purchase all or any part of the 15% royalty interest in a well to be drilled, designated as Deep Hole Well No. 2, and entered into a similar option agreement whereby they might purchase all or any part of a 15% royalty interest in a third well, to be drilled, of the bankrupt, designated as Deep Hole Well No. 3, said wells No. 2 and No. 3 to be located on nearby property. [Tr. pp. 60 and 47.]

That payments were made of all royalties accruing under the 12% in No. 1 well for the period ending September 1st, 1939. [Tr. p. 61.]

Summary of Argument.

Point 1.

The Bankruptcy Court had summary jurisdiction to determine the nature of the interest of appellants.

A. The property involved was in the actual or constructive possession of the court.

Point 2.

The theory of subordination of "investors" has not been modified or abrogated.

ARGUMENT.

POINT 1.

The Bankruptcy Court Had Summary Jurisdiction to Determine the Nature of the Interest of Appellants.

A. The oil wells and property upon which same were located were in the actual possession of the Bankruptcy Court as of the date of the filing of petition under Chapter XI. During this period the receiver and the trustee produced the oil, the proceeds from a portion of which are now in the hands of the Standard Oil Company of California which asserts no claim to such proceeds. The chief relief sought by the trustee was that the appellants' claim in and to the 12% interest in well No. 1, and the production therefrom, and proceeds thereof, were inferior and subordinate to the rights of the trustee and of the creditors. Jurisdiction to determine the foregoing is based upon the fact that actual possession of the subject matter of the controversy was in the Bankruptcy Court: *In the Matter of L. W. Baldwin*, 291, U. S. 610, 24 A. B. R., (N. S.) 487; *Taubel-Scott-Kitzmiller Co. etc. v. Fox*, 264 U. S. 426, 2 A. B. R. (N. S.) at 912.

The filing of the petition under chapter XI gave to the Bankruptcy Court the same jurisdiction as if a voluntary petition had been filed and an adjudication entered thereon as of the date of the filing of such petition under chapter XI, section 312 of the Bankruptcy Act; U. S. C., Title 11, Chap. 11, Sec. 712, which reads as follows:

“Where not inconsistent with the provisions of this Chapter the jurisdiction, powers, and duties of the court shall be the same . . . (2) Where a petition is filed under Section 322 of this Act, as if a

voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this Chapter was filed.”

As was said in *In the Matter of Baldwin, supra*:

“Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting same. . . . The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them.”

The appellant has discussed such cases as *Merritt v. Long*, 93 Fed. (2d) 257, and *Ramish, Inc. v. Laugharn*, 86 Fed. (2d) 686, each arising from the Ninth Circuit, on the proposition that summary proceedings will not lie as to appellants’ property. We have no quarrel with the ruling in either of these cases, and answer by pointing out that in the instant case, the actual, physical possession of the oil well and of its operation were in the trustee in bankruptcy.

We believe that the question of the summary jurisdiction of the Bankruptcy Court is so well established that no further discussion of the cases cited by the appellant is necessary insofar as they relate to the question of jurisdiction. See *Street v. Pacific Indemnity Co.*, 61 Fed. (2d) 106; 22 A. B. R. (N. S.) 170.

POINT 2.

The Theory of Subordination of "Investors" Has Not Been Modified or Abrogated.

In 1932, in *In the Matter of Lathrap*, 61 Fed. (2d) 37, 22 A. B. R. (N.S.) 136, this court established the law to be that persons who invested moneys with an operating lessee, in exchange for a portion of oil to be produced by the lessee, had claims and rights which would be subordinate to the rights of creditors of the lessee in the event that he became bankrupt.

The first reason assigned by the court for this ruling was that, according to the weight of authority in California, title to oil or gas in place could not be transferred *in praesenti*, and that the purchaser of an interest from an operating lessee acquired no interest in the realty. This rule, we will freely concede and admit, has been changed by the courts of the State of California, and the rule now is that such purchasers do acquire an interest in the nature of real property.

The second reason assigned, however, by this court, *In the Matter of Lathrap*, for its ruling, is to be found in the following language:

"Although percent holders are a recent product of corporate finance, and therefore, in a sense, *sui generis*, they bear a close analogy to preferred stockholders. . . .

Whether or not the percent holders come under the technical classification of stockholders, they are,—like stockholders, partners or joint adventurers—

“investors,” participants in the common enterprise. Had the bankrupt prospered and continued the operation of the oil well, these percent holders would have prospered with him, to an extent that their certificates did not even attempt to limit. Conversely, these same holders must be prepared to share in the bankrupt’s misfortunes. There is no equity in their favor that places them in a position equal to that of general creditors, who sold merchandise or labor at only a normal profit. The creditors should not be the first to be sacrificed. It is the ‘investors’ who should be ready to take the bitter with the sweet.”

The right of a Bankruptcy Court to thus subordinate “investors” has since been approved and reinforced by numerous rulings of the Supreme Court of the United States in such cases as *Pepper v. Litton*, 308 U. S. 295, and *Prudence Realization Corporation v. Geist*, Supreme Court of the United States, April 27, 1942, C. C. H. 53733.

In the former case, it is stated:

“In the exercise of equitable jurisdiction, the Bankruptcy Court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate.”

In the latter case it is stated:

“The Bankruptcy Act prescribed its own criteria for distribution to creditors in the interpretation and application of Federal statutes, Federal not local, law, applies. (Citing cases.) The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt’s estate is committed, and it is for that court—not without appropriate regard for rights

acquired under rules of State law—to define and apply Federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims, which, in other respects, are in the same class.”

Counsel has cited *Spier v. Lang*, 4 Cal. (2d) 711, 715, and *Theriot v. Plane* (C. C. A., 9th Cir.), decided March 31, 1942, to support appellants' contention that appellants are not within the *Lathrap* rule. Neither of these cases involved the right of the investor to obtain the return of his investment or to acquire the assets of an insolvent estate prior to payment of creditors. ✓

In the instant case, it will be observed that the appellants not only acquired 12% in well No. 1, but, at the same time, acquired an option to purchase up to 15% each in two additional wells. It appears that the cost of drilling one of these additional wells makes up a preponderance of the claims presently provable.

We would further call attention of the court to the fact that *Spier v. Lang, supra*, refers to Section 2401 of the Civil Code of the State of California which reads as follows:

“(4) The receipt by a person of a share in the profits of a business is *prima facie* evidence that he is a partner in the business,”

May we point out that the appellants in this matter did receive as their share of the profits, the royalties which accrued up to September 1, 1939.

So far as the appellee is advised, there has been no abrogation of the rule of subordination laid down by the *Lathrap* decision.

On the other hand, the Supreme Court of the State of California, in *Schiffman v. Richfield Oil Co.*, 8 Cal. (2d) 211, at 224, in a decision rendered since *Callahan v. Martin*, *supra*, speaks with some askance upon the right of percent holders when it says:

“If the effect of the percentage assignments was to create an undivided interest in the assignees in the leasehold estate, that is, in the right of profit to drill for and produce oil, notwithstanding it was understood that the lessees should retain exclusive management of the production enterprise, then as to such assignees the lessees are operating the well as their agents, or in some representative capacity. If the lessees are thus operating the well, the problem suggests itself as to the personal liability to third persons of the percentage assignees for debts and liabilities of the production enterprise. No question as to such liability is involved in the instant case.”

Wherefore, appellee respectfully submits:

1. That the Bankruptcy Court had summary jurisdiction to determine the matters involved herein.
2. That the decision and order arrived at by the Bankruptcy Court was correct.

Respectfully submitted,

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RUSSELL B. SEYMOUR,

By RUSSELL B. SEYMOUR,
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No. 10088

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B.
CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of DEEP HOLE
DRILLING CORPORATION, Bankrupt, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

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PAUL P. O'BRIEN,



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Appellees.

APPELLANTS' REPLY BRIEF.

In the reply brief of Appellee, it is stated that Appellants have correctly stated the facts with certain exceptions. Appellants wish to point out that what are termed exceptions are merely additional facts and are not in fact exceptions to the facts already given, there being no intention on the part of Appellants to misstate any fact. Furthermore, it is stated on page 6 of Appellants' brief that Standard Oil Company accepted the division order and "royalties were paid to appellants through August, 1939," and on page 7 it is stated that "The debtor corporation gave appellants an option to acquire royalty interests in other wells."

Reply to Point 1.

Under Point 1 of the Argument, Appellee seeks to establish jurisdiction of the bankruptcy court to summarily deprive Appellants of their property and in this discussion apparently relies upon the fact that physical possession of the oil well was sufficient to give the bankruptcy court jurisdiction to subordinate Appellants' ownership of 12% of the oil to the rights of general creditors. Appellants submit that it is pointed out in the opening brief, on page 30, that the oil was purchased at the well by the Standard Oil Company and title passed to the purchaser upon delivery. [Tr. p. 27.] The irrevocable division order had been accepted and under Point III, in the case of *Taylor v. Odell*, 50 Adv. Cal. App. 158, it is shown that the money for the production was held in trust for plaintiffs.

Therefore, it is respectfully submitted that the bankrupt had no interest in Appellants' oil or in the proceeds thereof and if the bankrupt had no interest therein, certainly the bankruptcy court would not have jurisdiction to deprive Appellants of their property. The cases cited by Appellee are cases wherein the bankrupt had an interest in the property which it was sought to protect for the benefit of creditors. For example, in the case of *Street v. Pacific Indemnity Co.*, 61 Fed. (2d) 106, referred to by the Appellee, it was pointed out that the county held the money for the account of the bankrupt at the time the petition was filed and further it could not therefore be said that the bankrupt had no interest in the money. Certainly those are not facts applicable to our case.

Reply to Point 2.

As anticipated by Appellants, the order of the bankruptcy court is sought to be upheld, on the authority of *In re Lathrap*, 61 Fed. (2d) 37. Appellants contend this case is no longer the law and the facts of the *Lathrap* case have been distinguished in the opening brief. As additional authority for the right of the bankruptcy court to subordinate Appellants' ownership in the oil to the right of general creditors, Appellee cites the case of *Pepper v. Litton*, 308 U. S. 295. In this case, the claimant occupied a fiduciary relationship with the bankrupt and it was shown that he did not act in good faith in his dealings with that concern and had unfairly attempted to gain advantage over creditors. The reasoning applied to that decision has no application here. There was no finding of bad faith or inequitable conduct on the part of Appellants and there was none in fact. From an equitable standpoint, it would seem apparent from the facts of our case that creditors who continued to extend credit to the bankrupt, which eventually resulted in its bankruptcy, and with full knowledge of Appellants' ownership of 12% of the oil, should be prevented from making any claim to Appellants' oil and the proceeds thereof.

The other case relied upon by Appellee, to-wit, *Prudence Realization Corporation v. Geist*, is not authority for the point made. No inequitable conduct has been charged against Appellants in this case and Appellants are not "claimants". As a matter of fact, in that case the right

of Prudence corporation, who did have a claim against the bankrupt to participate equally with the other creditors, was upheld.

Furthermore, the cases so cited by Appellee involved claims against the bankrupt estate. Appellants in this matter are not establishing a claim against the estate, but on the contrary are seeking to protect from arbitrary confiscation their vested property rights in oil in which the bankrupt had conveyed all its interest and in and to the proceeds of the oil held for their benefit by the Standard Oil Company. Appellee apparently places some reliance upon the case of *Schiffman v. Richfield Oil Co.*, quoting dictum therefrom, which question it was expressly stated was not involved in that case. On the other hand, we have an express holding of the court in the case of *Spier v. Lang*, 4 Cal. (2d) 711, that a joint adventure had not been established which would make defendant liable for drilling costs.

Wherefore, Appellants respectfully submit that in view of the law of the state of California and other decisions cited by Appellants in their opening brief, the *Lathrap* decision should be expressly overruled in so far as it subordinates the interest and ownership of overriding royalty holders in oil to the claims of general creditors and that the decision and order of the bankruptcy court should be reversed.

Respectfully submitted,

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By C. S. TINSMAN,

Attorneys for Appellants.

No. 10088.

IN THE

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LUNDBERG, J. C. HAYWARD and STANDARD OIL
COMPANY OF CALIFORNIA, a corporation,

Appellees.

BRIEF OF AMICUS CURIAE ON BEHALF OF
THE APPELLANTS.

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COMPANY OF CALIFORNIA, a corporation,

Appellees.

BRIEF OF AMICUS CURIAE ON BEHALF OF
THE APPELLANTS.

Preliminary Statement.

It is needless to restate the facts, as they are amply set forth in appellants' opening brief, and therefore we shall, as briefly as possible, state our contentions under the

SUMMARY OF ARGUMENT AND ARGUMENT.

Summary of Argument.

The Referee held that appellants were co-adventurers in a joint adventure with Deep Hole Drilling Corporation, and was sustained therein by the District Court except in a minor matter.

Great dissatisfaction in the legal profession has followed the holding of this court in *In re Lathrap*, 61 F. (2d) 37, on the question of what constitutes a joint adventure and who are joint adventurers. We submit that every assignee of a lessee's royalty is not necessarily a co-adventurer with the lessee. We believe that if this court examines the authorities hereinafter submitted on the question of joint adventure, it will not hesitate to declare that its holding in *In re Lathrap, supra*, is contrary to the law of California, and that the court will modify its views on the subject so as to make them conform to California law, and to that end we sincerely submit our

ARGUMENT.

POINT I.

The Purchaser of Overriding Royalties in a Producing Well Is Not, Ipso Facto, a Joint Adventurer With the Operator, and the Court Erred in Affirming Referee's Holding That Appellants Were Co-adventurers With Deep Hole Drilling Corporation.

Deep Hole Drilling Corporation, when it assigned to appellants 12% of its production from Well No. 1, was a going concern with a producing well producing at the rate of 400 barrels of oil a day. This is an important fact bearing on the question as to whether or not the Referee was justified in finding that the appellants were co-adventurers with Deep Hole Drilling Corporation in Deep Hole Well No. 1.

Adventure is defined by Webster as a mercantile or speculative enterprise of hazard, and consequently an adventurer is by the same token one who enters into a mercantile or speculative enterprise of hazard.

To hold that all purchasers of overriding oil royalties in a producing oil well, *ipso facto*, enter into a hazardous adventure, and to exclude the merchant who supplies his goods on credit in the same enterprise, from that category is unfair. There are many instances, of course, where backers of oil well operators are properly classified as co-adventurers with the operator, as in an unproven oil field, where the driller undertakes an original exploration and the backer pays the costs of drilling, for a large part of the profits. But to classify all purchasers of overriding royalties as co-adventurers in an oil well enterprise does violence to the definitions applied to real co-adventurers by the courts and textbook writers.

It will, we believe, be conceded, that in order to constitute a business arrangement a joint venture, that certain necessary elements must be present. Every joint venture must have the same elements as those of a partnership.

Spier v. Lang, 4 Cal. (2d) 711.

Section 2400 of the Civil Code of California declares the rule for the existence of a partnership. The relation of appellants to Deep Hole Drilling Corporation does not fit into a partnership relation, and by the same token it does not fit into the rules necessary to classify them co-adventurers.

Before citing authorities on the question let us analyze the decision in the *Lathrap* case. Its philosophy is predicated on the proposition that all percent holders in oil wells are co-adventurers with the operating lessee. What is said in the opinion as to the character of the certificates issued by the bankrupt lessee in that case, is of no moment now because the Supreme Court of California finally settled the question of what an overriding royalty is, in *La Laguna Rancho Company v. Dodge*, 18 A. C. 107; 114 Pac. (2d) 351.

It is therefore immaterial, for the purposes of a decision in the instant case, to consider any problem other than the fundamental question as to whether appellants were, in the face of the record here, and the law of the courts of last resort of California, co-adventurers with the bankrupt lessee, Deep Hole Drilling Corporation.

This legal question naturally arises: Upon what hypothesis did this court label the percent holders in *In re Lathrap* as co-adventurers with the driller?

On page 43 of the *Lathrap* case it is said:

“Since percent certificates are comparatively a recent device, we must expect to find that cases more or less squarely in point have been decided only in the last few years. The first federal decision involving facts on all fours with those of the case at bar was *United States & Mexican Oil Co. v. Keystone Auto Gas & Oil Service Co.* (D. C. Pa.), 19 F. (2d) 624, 625. In some respects that decision was based on facts that were more favorable to the certificate holders than those in the instant case. There the certificates themselves contained the following provision: ‘To provide funds hereinbefore mentioned from the receipts of said station there shall be set aside in a bank one cent on each gallon of gasoline sold, and 5 percent on all merchandise sold by said station, and the fund thus created shall be distributed every month among the registered holders of these certificates in said stations as their interest may appear.’ (Italics ours.) It will thus be seen that in the above case at least an attempt was made definitely to create what might be termed a trust fund for the benefit of the percent holders. Yet in the face of such specific attempt, Judge Schoonmaker said, at page 626 of the reported opinion in 19 F. (2d):

“On general principles of public policy, we believe that this contract is void as against the claims of general creditors. To permit corporations, by means of certificates of this kind, to appropriate corporate assets to certain classes of creditors or shareholders, whatever they may be, would be an absolute fraud upon the general creditors of the corporations concerned, and would permit the creation of a special type of preferred creditors not contemplated by law. If enforceable at all, this contract should only be enforced as against the stockholders of the company,

and not against the rights of creditors who have dealt with the corporation in the ordinary way. To give validity to such a contract would be to establish a legal vehicle for corporation fraud and illegal preference of creditors. These certificate holders cannot claim any part of the corporate funds to the detriment of general creditors.”

“There is no special equity vested in these certificate holders that should be protected. There is no special equity founded on the relation of these certificate holders to the funds on deposit in the several banks in question that should be protected. The fund in bank bears no special relationship to their money contributions to the company. The money in bank came from the sale of general assets of the company—*i. e.*, gasoline and other merchandise—in the regular and ordinary course of business. To impress this fund with a special trust in favor of these certificate holders would be wrong and a fraud on general creditors.”

“These certificates evidence an attempt on the part of the defendant to create a novel type of stock ownership, which would be superior in its claim to corporate assets over that of the corporate creditors. There is no equity in their claim or position, and there is no statutory authorization to create such a class of preferred stockholders or creditors, whatever you may call them. The funds in bank were not reduced to their possession; they have no claim on it.”

With due respect to this court and to the learned author of the opinion of *In re Lathrap*, we most sincerely submit that there is no legal analogy between a purchaser of overriding royalties in a finished and producing oil well and a stockholder of a corporation or a partner or a co-adventurer as the same are defined by law.

POINT II.

The Court Erred in Subordinating Appellants' Interest in the Oil and the Proceeds Thereof to the Claims of Creditors.

It is unfortunate that, in the *Lathrap* case, counsel for appellants referred to them as investors. It was an incorrect designation and the court apparently adopted the same designation from *In re Hicks-Fuller Co.*, 9 Fed. (2d) 492, where it is said that appellants were merely preferred stockholders and that their rights would be subject to the debts of the corporation, including general creditors. This court held to the same effect in *In re Lathrap*.

This court also adopted from *In re Hicks-Fuller Co.*, *supra*, the following general classification:

“It is not necessary, however, for us to regard the appellants as technically in the nature of joint adventurers or stockholders, in order to determine that their status is inferior to that of general creditors, who have dealt with the bankrupt in good faith and only for a normal profit.”

Such general classification cannot be applied to appellants in the instant case. Why a halo should be pressed on the brow of a merchant, who sells oil well equipment even at a normal profit, at the expense of a royalty owner, is incomprehensible. There is no evidence of such a situation in the record here. In so far as the record shows appellants bought royalties, *not as investors in a wildcat, or unfinished oil well*, but in a producing property operated by a sound business enterprise which had few debts. We ask, therefore: Upon what evidence before the Referee were appellants subordinated to creditors of this bankrupt, who furnished equipment on credit, even

without evidence that the profits thereof were normal? All merchants who extend such credit take risks and gamble on the possible success of an oil enterprise. We sincerely believe that this court will modify the sweeping declaration of *In re Lathrap*, which holds that all percent holders in an oil well are co-adventurers with the lessee. Such question should be determined only by the facts of each case upon legal evidence of what profits, if any, the merchant expected to make when he extended credit to the driller and upon the value of the well and the return the production brought the royalty owner. A rule of reason should be applied to the facts of each case.

The Referee held that:

“I am of the opinion that the claimants here are co-adventurers with the bankrupt in so far as Well No. 1 is concerned, and that the claims should be subordinated to the extent of claims of those who furnished supplies or other commodities for the completion of Well No. 1.” [Tr. p. 55.]

No reason is stated for the Referee's opinion.

It is obvious that the ruling of the Referee and the finding based thereon was the result of this court's decision in *In re Lathrap*, and since it is our contention that said finding is not sustained by the record, in that there is no evidence that appellants were engaged in a joint adventure with Deep Hole Drilling Corporation, we submit the following points and authorities.

It is held that the necessary elements of a joint enterprise are, a community of interest in the object of the undertaking, an equal right to direct and govern the conduct of each other with respect thereto, the duty to share

in the losses, if any, and a close and even a fiduciary relationship between the parties.

Larson v. Lewis-Simas-Jones Co., 29 Cal. App. (2d) 83; 84 Pac. (2d) 613.

See, also:

Beck v. Cagle, 46 Cal. App. (2d) 152; 115 Pac. (2d) 613;

Ford & McNamara Inc. v. Wilson, 119 Cal. App. 475; 6 Pac. (2d) 996;

Lerner v. Sanderson, 126 Cal. App. 481; 14 Pac. (2d) 584.

In *Spier v. Lang*, 4 Cal. (2d) 711, a question arose in an oil well transaction as to whether the relationship between the contracting parties was that of a partnership or joint venture. The court held that the question was one primarily for the trial court to determine from all the facts and inferences to be drawn therefrom.

The court said (p. 716):

“The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation or interest for the use of the money advanced. (*Vanderhurst v. De Witt*, 95 Cal. 57, 62 (30 Pac. 20, L. R. A. 595); *Coward v. Clanton*, 122 Cal. 451, 454 (55 Pac. 147); *Peoples Lumber Co. v. McIntyre & Peters*, 179 Cal. 780 (178 Pac. 954); *Martin v. Sharp & Fellows Contracting Co.*, 34 Cal. App. 584 (168 Pac. 373); *Auditorium Co. v. Barsotti*, 40 Cal.

App. 592 (181 Pac. 413); O. Krenz C. & B. Works, Inc., v. England, *supra*; Balck v. Brundige, 125 Cal. App. 641 (13 Pac. (2d) 999.) The foregoing conclusion and cited cases are in conformity with the definition of the partnership relation contained in the Civil Code (sec. 2400, Stats. 1929, p. 1898, formerly contained in sec. 2395), which includes as an essential element the joint participation in the conduct of the business. *The presence of the same element is necessary to constitute the parties joint adventurers.* (See, also, Martin v. Peyton, 246 N. Y. 213 (158 N. E. 77); Pierce v. McDonald, 168 App. Div. 47 (153 N. Y. Esch., 127 Okl. 275, 260 Pac. 755); Gille Hardware & Iron Co. v. Harrison, 89 Mo. App. 154; Cudahy Packing Co. v. Hibou, 92 Miss. 234 (46 So. 73, 18 L. R. A. (N. S.) 975).)” (Italics ours.)

The transaction between appellants and Deep Hole Drilling Corporation can only be tested by the contract between them, and it consists only of the royalty assignment. [Tr. pp. 38-42.] *It is utterly devoid of any of the elements necessary to constitute a partnership or joint venture.*

In view of the state of the law in California it is manifest that counsel for appellants in *In re Lathrap* failed to give due consideration to the importance of the question of what constituted a joint venture and attention of this court was not called to decisions of courts of last resort in California which laid down the essential elements necessary to constitute a joint venture, which were elements not present in the *Lathrap* case and are not present in the instant case.

In *Laugharn v. Bank of America*, 88 F. (2d) 551, this court held that a decision affecting interests created by an

oil and gas lease is a determination of rules of property which federal courts will follow when the state courts have so determined. It is said at page 553:

“If previous decisions of this court, in the absence of state court decisions, established a rule of property, which was later changed by state statute, can it be argued that this court must follow previous decisions? If the law of the state is established either by statute or judicial decisions, this court must follow the law of property as determined by the highest state court. Therefore, we must and do overrule the prior decisions of this court in so far as they are inconsistent with the settled law of California as adjudged by the California courts. On this basis we hold the assignments in the instant case to be conveyances of an interest in real property, and not to be executory contracts.”

By the same reason this court should not do less here than adopt the rule of law of the state courts and modify its decision in *In re Lathrap* on the question of joint venture for the reasons hereinabove suggested.

Conclusion.

We therefore most respectfully urge that this court modify its sweeping decision in *In re Lathrap*, declaring that all assignees of a lessee's interest in the production of an oil well are co-adventurers with the lessee, and adopt a rule in consonance with the law of California on the subject. This, of course, would require a reversal of the order and we sincerely trust that the court will so do.

Respectfully submitted,

CHARLES Z. WALKER,

Amicus Curiae, on Behalf of Appellants.

No. 10088.

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Appellees.

SUPPLEMENTAL BRIEF ON BEHALF OF
APPELLANTS.

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Appellees.

**SUPPLEMENTAL BRIEF ON BEHALF OF
APPELLANTS.**

Pursuant to permission of court obtained at the time of the oral argument, appellants file this supplemental brief in support of the jurisdiction of the Circuit Court of Appeals to hear and determine this matter and in support of their contention that under the circumstances of this case an appeal may be taken by appellants as a matter of right.

Appellant, Consolidated Royalties, Inc., received a conveyance of a 5% overriding royalty interest and appellant, C. B. Callahan, received a conveyance of a 7% overriding

royalty interest in the oil to be produced from the land upon which was situated Well No. 1 of the Deep Hole Drilling Corporation. This was accomplished pursuant to a permit of the Corporation Commissioner of the State of California. Paragraph 4 of the application for this permit states that the applicant proposed to sell and issue to appellants, or either of them, a 12% royalty interest in said Well No. 1 at and for the selling price of \$950.00 for each 1%. [Tr. p. 34.] The permit authorized such sale and the Deep Hole Drilling Corporation received \$4750.00 from Consolidated Royalties, Inc. and \$6650.00 from C. B. Callahan in consideration for such conveyances. [Tr. p. 29.] Consolidated Royalties, Inc. was given the right to collect payment of 12% of the proceeds of the oil from Standard Oil Company under the division order which was signed by both Deep Hole Drilling Corporation and C. B. Callahan and accepted by Standard Oil Company. [Tr. pp. 53-54.] Although two separate conveyances were made, it was accomplished in a single transaction in which both appellants were jointly interested. The prayer of the petition for the order to show cause in this matter [Tr. p. 6] required appellants to show cause why the Standard Oil Company of California should not turn over to the appellee the proceeds of all production for which previous payment had not been made and adjudging and decreeing that appellants had no right, title or interest in or to the production from the well or the proceeds of such production and classifying the rights of appellants in respect to the rights of general creditors.

The order to show cause itself [Tr. p. 8], which was addressed to appellants, required them to show cause why the relief prayed for by the trustee should not be granted and restrained appellants from prosecuting any action with respect to such proceeds or production. The order made in said matter by the referee [Tr. pp. 63-64] refers to the interest of the appellants as a 12% interest in the oil produced, but does not state this to be a several interest. The moneys on hand at that time amounted to \$846.08, but the order further provided that the right, title and interest of appellants in and to such 12% of the oil and the net proceeds thereof at that time amounting to said sum, plus such further proceeds as might accrue after April 30, 1940, were subject and subordinate to unpaid claims of creditors amounting to \$4,000.00 and the order required the Standard Oil Company to pay over all proceeds from the 12% until further order of a court of competent jurisdiction. In other words, appellants may not receive any part of their 12% of the proceeds from the well or production of said well until creditors have been paid \$4,000.00. The findings of the Referee [Tr. p. 62] state that the trustee did not have assets sufficient to pay the claims of creditors for the drilling of Well No. 1. The order was not limited to \$846.08, but required such further proceeds as accrue from said well after April 30, 1940, to be paid to the trustee until \$4,000.00 in claims have been paid. The total amount now held by the Standard Oil Company on account of the 12% royalty interest is \$1018.04. This in itself establishes that more

than \$500.00 jurisdictional amount is involved. Also appellants wish to point out that the stipulated facts and the findings establish that they paid \$950.00 for each per cent of interest owned. [Tr. pp. 21, 61.] The value placed upon a 1% interest in the well by the Deep Hole Drilling Corporation in its application to the Corporation Commission was \$1500.00 [Tr. p. 45.] It is clear therefore that the value of appellants' respective interests in the oil which has been subordinated to the general creditors greatly exceeds \$500.00 each.

Appellants submit that the court has jurisdiction, for the following reasons:

I. This is a controversy arising in bankruptcy, being a separable issue between appellants and the trustee concerning the right of the bankruptcy court to assume jurisdiction over appellants' property and concerns the right, title and interest of the bankrupt in and to appellants' oil. Therefore, it is an appeal which appellants are entitled to as a matter of right. Money is not the sole right affected by the order but appellants' property right in and to oil as well.

II. A trust fund was established for appellants and the aggregate amount to which they are entitled from this trust fund exceeds \$500.00.

ARGUMENT.

POINT I.

This Is a Controversy Arising in Bankruptcy Being a Separable Issue Between Appellants and the Trustee Concerning the Right of the Bankruptcy Court to Assume Jurisdiction Over Appellants' Property and Concerns the Right, Title and Interest of the Bankrupt in and to Appellants' Oil. Therefore, It Is an Appeal Which Appellants Are Entitled to as a Matter of Right.

The sum of \$846.00 is not all that is involved. Proceeds from 12% of the production of the well after April 30, 1940, were also included which, as above stated, have increased the sum held by the Standard Oil Company to \$1018.04. This is a controversy arising in bankruptcy proceedings. Appellants claim ownership of 12% of the oil produced from the land upon which Well No. 1 is located. The trustee in bankruptcy is seeking to take appellants' oil for the benefit of the general creditors of the bankrupt corporation, which conveyed this oil to the appellants long prior to bankruptcy and for value in the amount of \$11,400.00.

It is stated in the case of *In re Bastanchury Corp.*, 62 F. (2d) 537 at page 541 (9th Cir.):

“1. It is clear that the proceeding instituted by the trustee for the recovery of property in the possession of the respondent, to which she asserted an adverse claim, presented “a controversy arising in a bankruptcy proceeding”—as distinguished from an

administrative “proceeding” in bankruptcy—which might be reviewed by the Circuit Court of Appeals, both as to fact and law, by an appeal taken under Section 24a of the Bankruptcy Act (11 U. S. C. A. Sec. 47(a). *Taylor v. Voss* (No. 199) 271 U. S. 176, 46 S. Ct. 461, 70 L. Ed. 889, and cases therein cited; *Hinds v. Moore*, 134 F. 221, 223, 67 C. C. A. 149; *In re Eilers Music House* (C. C. A.) 270 F. 915, 925.’ ”

The court, in the case of *Hirschfeld v. McKinley*, 78 F. (2d) 124 (9th Cir.), after drawing the distinction between “controversy” and “proceedings” in bankruptcy, stated:

“Applying the definitions contained in the foregoing decisions, we have no difficulty in classifying the instant case as a ‘controversy’ in bankruptcy, ‘arising between the trustee representing the bankrupt and his creditors, on the one side, and adverse claimants on the other, affecting the extent of the estate to be distributed.’ *Taylor v. Voss*, *supra*, 271 U. S. 176, at page 181, 46 S. Ct. 461, 464, 70 L. Ed. 889.

Being a ‘controversy’ and not a ‘proceeding,’ the instant case may be appealed without the permission of this court.”

11 U. S. C. A. section 47(a) invests the Circuit Court of Appeals with appellate jurisdiction from the several courts of bankruptcy in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse both in matters of law and in matters of fact, provided that when the order involves less than \$500.00, an appeal may only be taken upon allowance of the Appellate Court.

Appellants contend that the order of the bankruptcy court was not limited to money only, but on the contrary deprives appellants of their vested property right in the oil to the extent of \$4,000.00 for which right in the oil they paid a total of \$11,400.00. As heretofore stated, the order of the bankruptcy court was not limited to the mere sum of \$846.08; it provided that all proceeds from said 12% be paid to the trustee. The sum of \$846.08 represented only that which had accrued to the last day of the month immediately preceding the issuance of the order to show cause.

The Circuit Court of Appeals for the Third Circuit was called upon to interpret the meaning of this limitation of \$500.00 on the privilege of appealing as a matter of right in a controversy in bankruptcy in the case of *In re Winton Shirt Corporation*, 104 F. (2d) 777. The appeal was from an order of the district judge directing the referee to furnish a transcript of certain testimony desired by the appellee, who was a creditor of the bankrupt. One of the questions raised was whether the appeal was properly before the court, not having been allowed by it. The court held that many orders, decrees or judgments arising in bankruptcy proceedings directly involved no sum of money whatsoever and cited many examples and in discussing its right to entertain an appeal under 11 U. S. C. A. 47(a), as to the wording "involves less than \$500.00," it said:

"We conclude that when the amended statute makes use of the word 'involves' it does so in the accepted sense in which that word is generally used, viz., to embrace, include or concern directly. It follows therefore that the order appealed from in the case at bar cannot be measured in terms of dollars.

Was it the intention of the framers of the amendment to permit appeals as a matter of right from all orders, decrees or judgments (save only as to interlocutory orders, decrees or judgments in controversies arising out of bankruptcy proceedings as distinguished from proceedings therein) in which no sum of money is involved, as well as from all orders, decrees or judgments involving the sum of \$500 or more? It may of course be argued with plausibility that an order which does not involve any sum of money cannot involve \$500, and that therefore an order not involving money cannot be appealed to this court except upon allowance of an appeal by this court. Such a ruling, however, would prohibit appeals as a matter of right in those cases which were allowed expressly under Section 25 of the Bankruptcy Act, 11 U. S. C. A. Sec. 48, as it existed prior to the recent amendment under discussion, including appeals from such judgments granting or denying a discharge to a bankrupt. Moreover, it should be noted that the amendment embraces in its terms the provisions theretofore included in Section 25a of the Bankruptcy Act. While the interpretation of Section 24a here contended for by the appellant would increase greatly the number of appeals, such an interpretation liberalizes the right of appeal in bankruptcy. While we were first inclined to adopt the narrower view contended for by the appellee to the effect that only orders, decrees or judgments involving sums of money and sums of money of \$500 or over were appealable as a matter of right, we now conclude that such a view would be erroneous."

In support of their decision the court referred to the case of *Robertson v. Berger*, 102 F. (2d) 530, decided by the Second Circuit, which involved an appeal from an order adjudging the bankrupt in contempt for failing to produce books, and the court quoted from this last mentioned decision as follows:

“We think that it (the amendment) means, not that our jurisdiction is discretionary whenever the order “involves” anything except money of more than \$500 in amount, but only when it “involves” money alone, and less than \$500. Our reasons are drawn both from the letter and the apparent purpose. Literally, an order like that at bar does not “involve less than \$500”; since it involves no money at all, it cannot involve less than any sum, for the comparative necessarily implies the characteristic. So much for the words. As to the purpose, the exception, which seems to have been drawn from Sec. 25(a) (3), 11 U. S. C. A. Sec. 48, was apparently designed to exclude trifling disputes. Unless it be limited to money, this purpose will be defeated, for there are many orders which “involve” other things, but are of much greater importance than claims for \$500. Such, for instance, are orders, punishing a witness for contempt, appointing or removing a trustee or a receiver, forbidding the bankrupt to leave the district, allowing examinations under Sec. 21a, 11 U. S. C. A. Sec. 44(a), closing first meetings of creditors. Even stays of suits cannot be said to “involve” the amount claimed against the bankrupt except by a strain, for they merely hold up their prosecution. Cases where the sum in question is less than \$500, but the sanction is imprisonment, or where the sanction is a fine of less than \$500, we do not decide; for here, although the value of the books as paper

is indeed less than \$500, the trustee does not want the papers, but the records upon them, and those have no money value. Hence neither the stake nor the sanction can be appraised in money.' ”

and in conclusion, stated:

“In our opinion the language just quoted correctly states the law upon this subject. We hold therefore that the appellant was entitled to appeal the order *sub judice* as a matter of right and that no allowance of the appeal was required.”

The case of *Scott v. Jones*, 115 Fed. (2d) 133, was an appeal by three creditors who had claims aggregating slightly more than \$300.00 from an order of the bankruptcy court directing property of the bankrupt to be sold at public auction. The trustee sought to have the appeal dismissed. The court, in denying the motion to dismiss this appeal, stated:

“The motion is predicated upon section 24 sub. a of the Bankruptcy Act, as amended by the Act of June 22, 1938, 52 Stat. 840, 854, 11 U. S. C. A. Sec. 47, sub. a, which provides that the Circuit Courts of Appeals are vested with appellate jurisdiction in proceedings in bankruptcy, and in controversies arising in bankruptcy, and that ‘when any order, decree, or judgment involves less than \$500, an appeal therefrom may be taken only upon allowance of the appellate court.’ It is contended that since the claims of appellants aggregate less than \$500 the amount in controversy is less than such figure and therefore appellants could appeal only by allowance of

this court. But their claims are not involved. The question whether they have *bona fide* claims, and if so in what aggregate amount, is not present. The question involved is whether the interest of the bankrupt estate in certain property was property sold at private sale or should be sold at public auction. The manner of sale of an interest in property is the question at issue on the appeal, not the claims of appellants. The provision in the statute relating to the manner of perfecting an appeal where less than \$500 is involved has no application to this appeal. Compare *Robertson v. Berger*, 2 Cir., 102 F. (2d) 530; *In re Winton Shirt Corporation*, 3 Cir., 104 F. 2d 777."

Appellants respectfully submit that the reasoning in the above cases is directly applicable to their case as the order of the bankruptcy court, not only deprived them of their interest in the proceeds in the oil then held by the Standard Oil Company, but also deprives appellants of their title and interest in the oil itself until such time as unpaid creditors in the drilling of Well No. 1, to the extent of \$4,000.00, have been paid. It is clear, therefore, that the cash amount involved does actually exceed \$500.00 as to each appellant. Furthermore, appellants' royalty interest was acquired at a cost of \$11,400.00, which establishes that the value of appellants' property interest, which has been subordinated to the rights of general creditors greatly exceeds \$500.00.

POINT II.

A Trust Fund Was Established for Appellants and the Aggregate Amount to Which They Are Entitled From This Trust Fund Exceeds \$500.00.

Appellants contend that the Circuit Court of Appeals has jurisdiction of this matter for the additional reason that the amount involved on this appeal, held by the Standard Oil Company is a trust fund for appellants' benefit and that the rights and interests of appellants in and to this fund is common and that the amount of their joint claims is the test of jurisdiction. In the brief of appellants on file herein, appellants have cited numerous cases to show that the moneys held by the Standard Oil Company were trust fundes for the benefit of appellants. Consolidated Royalties, Inc., under the division order, was entitled to receive payment and collect the total proceeds derived from this 12% interest. Appellants are claiming under a common source of title and to this extent are in privity in claiming such trust fund, which was established for their benefit. The right of several persons whose individual claims were less than the jurisdictional amount to be heard under such circumstances was upheld in *Rodd v. Heartt*, 17 Wall. U. S. 354, 21 L. Ed. 627, *Putnam v. Timothy Dry Goods, etc.*, 79 Fed. 454, and *Troy Bank v. G. A. Whitehead & Co.*, 222 U. S. 39.

The appeal in this case is from a joint order which affected the common interests of appellants in this trust fund. They were cited in an order to show cause together and, as the court stated in *Investors Syndicate v. Smith*, 105 F. (2d) 611, at page 617:

“A further ground of appellee's motion is that appellants have joined in a single appeal, instead of

taking three appeals, as appellees contend they should have done. We think appellees' contention is without merit. The appeal is not from three orders, but from one only. Each appellant has, it is true, a separate interest, but all have a common interest in reversing, if they can, the order appealed from. The questions presented are common to them all. It was proper, therefore, for them to join in a single appeal. *Crim v. Woodford*, 4 Cir., 136 F. 34, 36."

Where a judgment runs against defendants jointly, the value of their aggregate interest determines jurisdiction. *Friend v. Wise*, 111 U. S. 798. Furthermore, rule 74 of the Rules of Civil Procedure for the District Courts of the United States provide that parties interested jointly, severally or otherwise in a judgment may join in an appeal therefrom.

In the case of *Peterson v. Sucro*, 98 Fed. 878, an action was instituted to try title to land. Defendants contended that the jurisdictional amount was not involved because plaintiff's interest was mortgaged and its value was not shown to exceed \$3,000.00 above the mortgage. The Circuit Court held, however, that the jurisdiction of the court was not affected by the amount of the outstanding mortgage since it was the value of the land involved in the controversy, rather than merely plaintiff's equity of redemption therein that would determine jurisdictional amount and in the case of *Greenfield v. U. S. Mortgage Co.*, 133 Fed. 784, where the plaintiff sought to remove a cloud on the title to land appearing because of foreclosure of a mortgage, which amounted to less than the jurisdictional amount, the court upheld the jurisdiction stating that the value of the land, not the amount neces-

sary to redeem was the determining factor. Certainly, appellants' interests in the oil is not limited to the sum held by the Standard Oil Company on April 30, 1940. Appellants paid \$11,400.00 for their said interest in such oil, and the fact that the bankrupt valued a one percent interest at \$1,500.00 establishes that the value of appellants' property so taken for creditors far exceeds \$500.00.

Conclusion.

Appellants respectfully submit, therefore, that the Circuit Court of Appeals has jurisdiction, because the order of the bankruptcy court covers in addition to \$846.08, proceeds from appellants' oil to the extent of \$4,000.00. Furthermore, appellants are entitled to join in this action in establishing their right to the trust fund held by the Standard Oil Company for their common interest and the amount so held is to be taken as the criterion in determining the jurisdictional amount involved. Appellants, therefore, urge that the Circuit Court of Appeals has appellate jurisdiction to hear and determine this matter.

FLEMING & ROBBINS and

C. S. TINSMAN,

Attorneys for Appellants.

No. 10088.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B.
CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of Deep Hole
Drilling Corporation, bankrupt, *et al.*,

Appellees.

AMICUS CURIAE BRIEF OF JOSEPH J.
RIFKIND IN SUPPORT OF APPELLEE.

FILED

OCT 26 1942

PAUL P. O'BRIEN,
CLERK

JOSEPH J. RIFKIND,
535 Rowan Building, Los Angeles,
Amicus Curiae.

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AMICUS CURIAE BRIEF OF JOSEPH J.
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Statement of Case.

The bankrupt was an operating lessee under an oil and gas lease. The bankrupt incurred divers obligations in the drilling and operation of its Well No. 1 aggregating in excess of \$4000.00. The bankrupt as operating lessee sold to appellant a fractional interest in the production from said Well No. 1 aforesaid. The bankrupt also incurred divers obligations in the drilling of Well No. 2 located upon the same leasehold premises. [Stipulation of Facts, Tr. pp. 25 to 32, incl.] That prior to the execution of the assignment of said fractional interest, by the bankrupt as operating lessee to the appellant, an applica-

tion was made to and a permit was obtained from the Commissioner of Corporations authorizing the bankrupt to issue its securities, a copy of the proposed assignment being attached to said application, to evidence the character of securities proposed to be issued by the bankrupt. [Application for Permit to Issue Securities, Tr. pp. 33 to 40, incl.] The assignment makes no attempt to convey a fractional interest in the leasehold estate, only a percentage of the production is assigned from the well drilled, operated and managed by the bankrupt. The debts incurred by the bankrupt remain unpaid.

ARGUMENT.

POINT 1.

In re Lathrap, 61 Fed. (2d) 37 Has Not Been Overruled by Laugharn v. Bank of America, 88 Fed. (2d) 551.

The basis of appellant's argument is that the case of *In re Lathrap*, 61 Fed. (2d) 37 has been overruled by the case of *Laugharn v. Bank of America*, 88 Fed. (2d) 551. A cursory reading of the case of *Laugharn v. Bank of America. supra*, because of *dictum* therein, might give support to such contention. An analysis of the case of *Laugharn v. Bank of America, supra*, however, clearly shows that it does not overrule the earlier case of *In re Lathrap, supra*.

One of the several considerations before the Circuit Court when it rendered its decision in the case of *In re Lathrap, supra*, was whether an owner or lessee had present title to oil in place, that particular problem not having previously been determined by the state courts of

last resort. The Supreme Court of the State of California, in *Callahan v. Martin*, 3 Cal. (2d) 110, decided after *In re Lathrap*, *supra*, but before *Laugharn v. Bank of America*, *supra*, that both the lessor and the lessee had title to oil in place. The Circuit Court in *Laugharn v. Bank of America*, *supra*, does not overrule its previous decisions of *In re Lathrap*, *supra*, but merely states that *insofar* as its prior decision in *In re Lathrap*, *supra*, is *inconsistent* with the case of *Callahan v. Martin*, *supra*, it is overruled. We quote from *Laugharn v. Bank of America*, *supra*, at page 553, as follows:

“As the law then stood, this court was presented with two cases involving the nature of royalty interest holder’s right whose interest was acquired from a lessee in an oil and gas lease. It was held that neither the owner nor the lessee had any present title to oil in place, and therefore the assignment by the lessee did not convey the present title. *In re Lathrap* (C. C. A. 9), 61 F. (2d) 37; *Bank of America Nat. Trust & Savings Ass’n v. Fisher* (C. C. A. 9) 61 F. (2d) 53.

“Thereafter, the Supreme Court of California, in *Callahan v. Martin*, 3 Cal. (2d) 110, 43 P. (2d) 788, 792, 101 A. L. R. 871, considered the same issue and held that after an oil and gas lease, both the lessor and the lessee had an interest in real property capable of assignment or conveyance. * * *

“The determination of the interest created by an oil and gas lease is the determination of rules of property, *Guffey v. Smith*, 237 U. S. 101, 113, 35 S. Ct. 526, 59 L. Ed. 856. It is our duty to follow the law of the state established by legislative enactment, or decision of the highest court of the state, with respect to property rules. * * *

“* * * Therefore, we must and do overrule the prior decisions of this court *in so far as they are inconsistent* with the settled law of California as adjudged by the California courts. On this basis we hold the assignments in the instant case to be conveyances of an interest in real property, and not to be executory contracts.”

It should also be noted that in *Laugharn v. Bank of America, supra*, unlike in the present instance, the bankrupt had not made an assignment of a fractional interest, but had assigned the entire residuary interest in the leasehold estates. Under that circumstance, it would not have been necessary for the bankrupt to have obtained a permit from the corporation commissioner, as is necessary in the case of the issuance of fractional interests by an operating lessee. We quote from *Laugharn v. Bank of America, supra*, page 552, as follows:

“On the same date Huntington executed and delivered to appellee, as security for the loans made to itself and to Lion, and as security for future loans which might be made to itself, Lion and to Tide, an assignment, which provided that Huntington ‘does hereby assign, transfer and convey * * * all its right, title and interest in and to all crude oil, gas and other hydrocarbon substances produced from that certain oil well known as Huntington Shore Oil Company Well No. 1, situated upon (lot 2 above mentioned)
* * * ’”

The holding in the *Laugharn v. Bank of America, supra*, case, in so far as it relates to an interest reserved by the landowner lessor or to any fractional interest issued by the landowner lessor from that reserved under the lease, is supported by *Callahan v. Martin, supra*, and subsequent cases of courts of last resort of the state. The holding in *Laugharn v. Bank of America, supra*, in so far as it relates to fractional interests issued by an operating lessee, is not supported by *Callahan v. Martin, supra*. We quote from *Callahan v. Martin*, 3 Cal. (2d) 110 (1935):

“It is unnecessary here to determine the effect of our decision in the instant case on the nature of royalty interests created by an operating lessee, rather than by the landowner-lessor, as in the instant case. This question was involved in such cases as Western Oil, etc. Co. v. Venago Oil Corp., 218 Cal. 733 (24 Pac. (2d) 971, 88 A. L. R. 1271); Black v. Solano Co., 114 Cal. App. 170 (299 Pac. 843); Merrill v. California Petroleum Corp., 105 Cal. App. 737 (288 Pac. 721). In these cases the doctrine of potential possession of personality—the oil severed from the land and brought to surface—was applied. This doctrine has since been abolished by the adoption of section 5 of the Uniform Sales Act, section 1725 of the Civil Code.”

and in *Schiffman v. Richfield Oil Co.*, 8 Cal. (2d) 211, p. 222 (1937):

“In Western Oil etc. Co. v. Venago Oil Corporation, supra, we did not hold that the percentage as-

signments vested in the assignees an interest in real property. Since our decision in that case we have held that certain royalty assignments *made by landowner-lessors* operated as transfers of interests in real property. (*Callahan v. Martin*, 3 Cal. (2d) 110, 101 A. L. R. 871; *Standard Oil Co. v. J. P. Mills Organization*, 3 Cal. (2d) 128; *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal. (2d) 637.) Respondent urges us now to hold that said cases establish the character of the assignments to him, which were made by a lessee, in this case a sublessee, rather than by a landowner-lessor. *For reasons which we will state we are unwilling in the instant case to thus apply the cited cases."*

and in *Dougherty v. Calif. Kettleman Oil Royalties, Inc.*, 9 Cal. (2d) 58, p. 76 (1937):

"It is perfectly clear that the term 'real estate' as used in the constitutional provision only applies to freehold interests. It does not apply to interest less than a freehold, such as an interest for a term of years. *It has quite recently been held by this court that an oil and gas lease for a term of years is not real estate*; that although such a lease creates an interest in real property, or in real estate, being less than a freehold, it is a chattel real which is personal property. * * * *Obviously a royalty interest, such as is here involved, cannot rise to a greater dignity than the lease upon which it is predicated.*"

POINT 2.

The Purchasers of Fractional Interest in Production From an Oil Well Are Investors and as Such Their Rights Are Subordinate to the Rights of Creditors.

The issuance and sale of assignments of royalty interest is a form of financing which was originally conceived by small oil operators to circumvent the Corporate Securities Act of the State of California. That such assignments of royalty interest are now expressly covered by the Corporate Securities Act is not disputed, in fact the act is too clear and the cases too numerous. Whether holders of assignments of royalty interest are more analogous to preferred stockholders or limited partners or whether the holders of assignments of fractional interest in production have an interest in real property or in personal property, is of no importance if they in fact are investors in the project of the bankrupt. It cannot be disputed that investors of this character are dependent for their return upon the success or failure of the bankrupt's drilling and operations. The Supreme Court of the State of California in the case of *Domestic & Foreign Petr. Co. v. Long*, 4 Cal. (2d) 547, says:

“Indeed, in the absence of any specific provision in the Corporate Securities Act *expressly bringing oil interests within the definition of security; the individual owners of an oil lease who, as in the instant case, transfer to others the right to participate in the proceeds from an oil production enterprise*

*to be conducted by the lessees, create an investment contract, or certificate of interest or participation, as those terms are defined and explained in the cases cited in the above paragraph. The specific reference in the definition of 'security' as it stood at the time of the transaction herein to 'certificate of interest in an oil, gas, or mining lease', and in the act as it now reads to 'certificate of interest in an oil, gas, or mining lease', may seem to bring within the definition instruments besides those which represent a right to share in the proceeds of an oil production enterprise to be conducted by others * * * instruments of the class involved in the instant case are 'securities' under the law."*

and again in the case *People v. Rubens*, 11 Cal. (2d) 578 the Court says:

"Under circumstances very similar to those which exist in the present case it was determined in the recent cases of *People v. Craven*, 219 Cal. 522, and *Domestic & Foreign Petroleum Co. Ltd. v. Long*, 4 Cal. (2d) 547, *that contracts which were called 'grant deeds' assigning undivided interests in oil and gas leases entitling the holders thereof to participate in the proceeds of the petroleum produced by the vendor from the land were in fact 'securities' within the meaning of the Corporate Securities Act which are prohibited from being transferred or sold without first procuring a permit therefor from the corporation commissioner."*

In the case of *In re Hawkeye Oil Company*, 19 Fed. (2d) 151, involving a similar type of investment certificate the Court says:

"The primary problem presented by these petitioners for review is the ascertainment of the status

and rights of the holders of 'participating operation certificates' issued or assumed by Hawkeye Oil Company, bankrupt, the owner of bulk and service stations for the storage and sale of gasoline. The relationship of the certificate holders and of the bankrupt arises out of contract. The rights of the holders are fixed, and measured by the terms, substance, and effect of the contract. That contract, unless modified or enlarged by mortgage, is found in the certificates, which provide:

* * * * *

"To provide the fund hereinbefore mentioned, from the daily receipts of said station there shall be set aside in a bank one cent (1¢) on each gallon of gasoline and five per cent (5%) on all other merchandise sold by said station, and the fund thus created shall be distributed every month among the registered holders of these certificates in said station as their interests may appear.'

* * * * *

"* * * The funds so deposited were claimed by both the certificate holders and the general creditors of the insolvent defendant. Judge Schoonmaker said that the certificates evinced an attempt to create a novel type of stock ownership superior in its claim to corporate assets to that of the general creditors, and that, 'on general principles of public policy, we believe that this contract is void as against the claims of general creditors. To permit corporations, by reason of certificates of this kind, to appropriate corporate assets to certain classes of creditors or shareholders, whatever they may be, would be an absolute fraud upon the general creditors of the corporations concerned and would permit the creation of a special type of preferred creditors not contemplated by law.

If enforceable at all, this contract should only be enforced as against the stockholders of the company, and not against the rights of creditors who have dealt with the corporation in the ordinary way. To give validity to such a contract would be to establish a legal vehicle for corporation fraud and illegal preference of creditors. These certificate holders cannot claim any part of the corporate funds to the detriment of general creditors.' * * *"

And in *Brownie Oil Co. v. R. R. Commission*, 240 North Western, p. 827, the Court says:

"This is a device for financing a corporation. The inducement to secure this financing is the promised creation of a fund which will later be distributed to the person making the investment or furnishing the financing. This person waives his right to any interest or dividends as such, but he does invest with the hope or expectation that the money invested will be returned to him together with some payment for its use. He acquires the right to have the fund accumulated and to receive his distributive share when it is accumulated. He accepts the risk that the enterprise will be unable to get into operation and that the period of its operation will be neither sufficiently long nor successful to bring him the expected returns. In *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937, 938, the court said: 'Placing of capital or laying out of money in a way intended to secure income or profit from its employment is an "investment" as that word is commonly used and understood.' "

In *People v. McCalla*, 63 Cal. App. 783, where deeds were issued to specific parcels of real property, the pur-

chasers in addition were given the right to participate in certain operations of the grantor, the court says:

“The corporation, upon or with the lands of others, was to carry on a business for profit, it being agreed that a part of the income—five per cent—should be retained by the corporation and that the balance, after deducting all necessary and proper expenses, should be distributed to the land owners. Though the case differs in its outward form from that of a corporation engaged in extracting wealth from its own land, selling the produce and dividing the net profits among its stockholders in the shape of dividends, still, in the essentials, there is no material difference between this case and that of a corporation so engaged in exploiting its own land. The difference is in the bark, not in the pith.”

Also in *Warren v. King*, 108 U. S. 389, the court says:

“His (preferred stockholder’s) chance of gain by the operations of the corporation, throws on him as respects creditors, the entire risk of the loss of his share of the capital, which must go to said creditors in case of misfortune. He cannot be both creditor and debtor by virtue of his stock.”

Also *Newton National Bank v. Newbegin*, 74 Fed. 135, the court says:

“Where a corporation becomes bankrupt, the temptation to lay aside the garb of the stockholder on one pretense or another and assume the role of a creditor is very strong, and all attempts of that kind should be viewed with suspicion.”

That the Circuit Court in *Laugharn v. Bank of America*, *supra*, despite loose language and *dictum* to the con-

trary, did not intend to overrule its previous decision in *In re Lathrap, supra*, in so far as that case holds, that rights of holders of fractional interests issued by an operating lessee are subordinate to the rights of general creditors of the operating lessee who becomes bankrupt, is evidenced by its decision wherein it says, in *Sasso v. H. C. Goldman*, 100 Fed. (2d) 210:

“This court said in *In re Lathrap*, 61 F. (2d) 37, that it is not necessary that claimants in bankruptcy be regarded as ‘technically in the nature of joint adventurers or stockholders, in order to determine that their status is inferior to that of general creditors, who have dealt with the bankrupt in good faith and only for a normal profit.’ However, the claims there were based on the ownership of royalty interests. The claimants, as the court pointed out, were referred to even by themselves, as ‘investors’, and were thought to bear a close analogy to preferred stockholders. Similarly, in *Bank of America v. Fisher*, 9 Cir., 61 F. (2d) 53, it was determined that the claimant and the debtor were joint adventurers.”

The Supreme Court of the State of California in *Schiffman v. Richfield Oil Co.*, 8 Cal. (2d) 211 (1937) clearly recognizes that the property interest of royalty holders of an operating lessee may be subordinated to the rights of creditors, to-wit:

“If the effect of the percentage assignments was to create an undivided interest in the assignees in the leasehold estate, that is, in the right of profit to drill for and produce oil, notwithstanding it was understood that the lessees should retain exclusive management of the production enterprise, then as

to such assignees the lessees are operating the well as their agents, or in some representative capacity. *If the lessees are thus operating the well, the problem suggests itself as to the personal liability to third persons of the percentage assignees for debts and liabilities of the production enterprise. * * **

In *Wortley v. Wood-Callahan*, *supra*, the court stating on page 469, as follows:

“The assignment of the leasehold by Wortley to Wood-Callahan was complete and without reservation of any kind as to Wortley.”

and again on page 470, as follows:

“In support of this proposition the appellant cites *In re Lathrap*, 61 Fed. (2d) 37. The factual distinction between those cases and the instant one is the very thing that defeats the claim of appellant. There the question arose as a result of bankruptcy proceedings against the lessee, and at the time of the action the lessee held the lease. Here the deceased had nothing at the time of his death.”

We also refer to the case of *Schwartz v. Hatch*, 45 Cal. App. (2d) 510, at pp. 519 and 520, as follows:

“*In re Lathrap*, 61 Fed. (2d) 37, can readily be distinguished from the case at bar. There the court held that in bankruptcy, the proceeds of the oil should be distributed to the general creditors in preference to persons holding royalty certificates similar to those issued by Hub Ltd. It did not consider the question of whether or not the certificate holders would be personally liable to creditors, although there are cases in other states which seem to so hold. But the chief distinguishing feature of *In re Lathrap* and these

other cases is that there were creditors who had dealt with the company in good faith and 'only for a normal profit' (61 Fed. (2d) p. 44). Thus the rule there applied seems to be limited to credit 'for a normal profit'. Again in the Lathrap case, page 44, the court uses this extremely significant language: 'These per cent holders are junior in right to the general creditors who furnished commodities to the bankrupt *not at speculative but at normal profit.*' (Italics added.) Here, the actions of the defendants were not for a normal profit but for a highly speculative one, a percentage interest in the production of the well when completed."

In *La Laguna v. Dodge*, 18 Cal. (2d) 132 the Supreme Court held that although an operating lessee had issued various overriding royalties, that the operating lessee retained the management and control and could without the consent of the holders of such fractional interest in the production quitclaim the leasehold premises.

"Defendants contemplated the purchase of a speculative interest in real property which they intended should be determinable by the lessees. * * * Continued drilling might prove that no oil could be produced from the land in question. * * * We do not see how the surrender of the leasehold by the lessees imposes any unanticipated risk upon the holder of the overriding royalty. * * * In the present case, however, the surrender of the leasehold by quitclaim deeds operated to terminate the interests of the defendants, as well as the interest of the lessees, in plaintiff's land."

We think this decision clearly illustrates that whatever the property rights of holders of fractional interest in oil to be produced, whether such interest be real or personal property, the same at times necessarily becomes subordinate to the rights of third persons dealing with the operating lessee, in the case cited they were subordinated to enable the operating lessee to quitclaim, in the instant case they are likewise subordinate to the payment of creditors of the operating lessee. The fact that such percentage interest may constitute an interest in real property does not preclude such interest being subordinated to the payment of the operating lessee's indebtedness.

Conclusion.

If appellant's theory be correct, then an operating lessee could assign fractional interests aggregating 99 percent, each one of the holders of interests aggregating 99 percent would be entitled to his portion of the production free and clear of all obligations arising from the drilling and operation of the well, leaving the holders of claims for labor, material and other obligations arising from drilling and operating the well without any assets to resort to in satisfaction of their claims. I do not believe that any logical or equitable reasoning can be found to support such a conclusion nor do the authorities sustain such a position. Whatever may be the contractual relationship between the bankrupt and his investors, such investors in the event of final difficulties, whether bankruptcy ensues or not, must be relegated to a subordinate position

to creditors of the enterprise of the operating lessee. These investors whether they be called grantees, holders of assignments, overriding royalties, limited partners, mining copartners, preferred stockholders or whatnot, are none the less investors, speculating their funds upon the success or failure of the operating lessee, as such they cannot and should not be permitted to reap the benefits of the operating lessee's endeavors without being compelled to sustain the corresponding losses if the project proves unsuccessful. Italics in citations throughout are ours.

Respectfully submitted,

JOSEPH J. RIFKIND,

Amicus Curiae.

No. 10088

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED ROYALTIES, INC., a corporation, and C. B.
CALLAHAN,

Appellants,

vs.

HARRY ASHTON, Trustee of the Estate of Deep Hole
Drilling Corporation, Bankrupt, *et al.*,

Appellees.

REPLY OF APPELLANTS TO AMICUS CURIAE
BRIEF OF JOSEPH J. RIFKIND IN SUP-
PORT OF APPELLEE.

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PORT OF APPELLEE.

The *amicus curiae* brief of Joseph J. Rifkind in support of Appellee, under the Statement of Case, states that the bankrupt incurred divers obligations in the drilling of Well No. 2 located upon the same leasehold premises as Well No. 1. As a matter of fact, Well No. 2 did not involve the same leasehold premises and was drilled on property in which Appellants had no interest whatsoever. Great emphasis is placed by Mr. Rifkind upon the fact that under California law, before an interest in a mining

title or lease may be conveyed, a permit must be obtained therefor, which conveyances, for the purposes of the Corporate Securities Act, and that Act alone, are denominated "securities."

Under Point I of his brief, Mr. Rifkind argues that the *Laugharn* case does not overrule the *Lathrap* case as to an interest created by an operating lessee, because the Court relied on *Callahan v. Martin*, 3 Cal. (2d) 110, which involved only the interest of a landowner lessor and not the interest of an operating lessee. He quotes from *Schiffman v. Richfield Oil Co.*, 8 Cal. (2d) 211, to the effect that the Supreme Court was unwilling at that time to apply the landowner-lessor rule to an operating lessee's interest and concludes by quoting a portion of *Dougherty v. California Kettleman Oil Royalties, Inc.*, 9 Cal. (2d) 58, which held that a royalty conveyed under a lease for a definite term of years was personal property. Mr. Rifkind fails to point out that the lease in our matter was for a term of years and so long thereafter as oil should be produced, which type of lease has long been held to be real property in this state. He also has failed to point out that the Supreme Court of California has now extended the landlord-lessor real property principal to the interest created by an operating lessee who conveys an overriding royalty. The case of *La Laguna Ranch Co. v. Dodge*, 18 Cal. (2d) 132, already cited in Appellants' briefs expressly states on page 140 that:

"Defendants' overriding royalties were, therefore, interests in real property."

The portion of the *Laugharn* case cited by Mr. Rifkind on page 4 of his brief is therefore most appropriate. It is as follows:

“Therefore, we must and do overrule the prior decisions of this court in so far as they are inconsistent with the settled law of California as adjudged by the California courts. On this basis we hold the assignments in the instant case to be conveyances of an interest in real property and not to be executory contracts.”

Under Point II, Mr. Rifkind makes the broad assertion that the purchaser of a fractional interest in production from an oil well is an investor whose rights are subordinate to the rights of creditors. In an attempt to substantiate this broad assertion it is apparently his contention that any person who purchases property from a vendor with the expectation of making a profit is an “investor” who should be subject to the rights of creditors of such vendor. In an attempt to justify this contention, Mr. Rifkind refers to the Corporate Securities Act of the State of California, which requires a permit to be secured by an owner before executing and delivering a certificate of interest in an oil, gas or mining title or lease. He states that because royalty assignments and grant deeds conveying a fractional interest in oil properties have been construed to be within the purview of the Act, this constitutes the holder of an overriding royalty assignment the owner of a security similar to a stockholder in a corporation. Such is not the fact. Cases cited by him have to do

with violations of the penal statute which was enacted to prevent loss to purchasers through fraud of a vendor and in the case of corporations to see that stock be not issued without consideration therefor. (*People v. Kudder*, 98 Cal. App. 206.) In other words, the purpose of this Act is to see that a purchaser obtains what he pays for and to see that the corporation selling the security, in the case of corporations, receive consideration required by the permit before the property is conveyed, in order that creditors of the corporation may be protected.

There is no provision in the Corporate Securities Act which states that the purchaser of an overriding royalty interest becomes a preferred stockholder or limited partner or an investor in the business of the vendor. The fact that the Corporate Securities Act covers royalty interests has no bearing whatsoever upon the issues of this case and the case of *People v. Kudder, supra*, indicates that when the purchaser has received what he pays for and has actually paid to the vendor the consideration required, the creditors are protected. Certainly, those creditors, who, with knowledge of the recorded conveyance of this oil to Appellants, continued to extend credit to the bankrupt, should not be entitled to claim that Appellants must, in addition to the consideration paid for their fractional interest of oil, deliver to such creditors the oil itself. There is nothing in the Corporate Securities Act which would sanction such a contention and such contention is contrary to equitable principles.

Mr. Rifkind ignores a further material difference between the conveyance in our case and that involved in the cases cited by him. The interest of appellants in this matter was an overriding royalty interest and conveyed

12% of the oil to be produced from Well No. 1 and not merely the right to participate in profits after deducting expense as in the case of *People v. McCalla*, 63 Cal. App. 783, and *In re Hawkeye Oil Company*, 19 Fed. (2d) 151. This constitutes the fundamental distinction. The *Hawkeye Oil Company* case which Mr. Rifkind states involves a similar type of investment certificate, in fact involves a participation operation certificate. There was no conveyance in that contract of the gasoline to be sold, but only the right to participate in the daily receipts on gasoline and all other merchandise sold by the issuer of the certificate. The reasoning of this case cannot be applied to a case where title to the 12% of the oil was conveyed to Appellants. The cases of *People v. McCalla*, 63 Cal. App. 783, and *Domestic & Foreign Petr. Co. v. Long*, 4 Cal. (2d) 547, both involve the Corporate Securities Act.

Mr. Rifkind under Point II again refers to *Schiffman v. Richfield Oil Co.*, 8 Cal. (2d) 211, and to the abstract question there raised, but intentionally not answered, as to whether percentage assignees might be liable for the production enterprise if they had the right to participate in the management of the production enterprise. The case of *La Laguna Ranch Co. v. Dodge*, *supra*, as well as *Spier v. Lang*, 4 Cal. (2d) 711, and other cases, clearly show that Appellants had no right to participate in the management of the company. Mr. Rifkind quotes from the *La Laguna Ranch Co. v. Dodge* case to the effect that the lessee had the right to quitclaim under the lease and that such terminated the interest of the overriding royalty holders and states that this case is authority for subordinating the rights of the royalty holders to the rights of the operating lessee. It is significant, however, that this

right to quitclaim was expressly reserved in the lease and the royalty holders acquired their assignments with knowledge of this provision. The court simply enforced the terms of the contract. There is no agreement or contract whatsoever in our case to the effect that Appellants' right, title and interest in the oil may be subordinated to the payment of the vendor's indebtednesses.

Conclusion.

It is respectfully urged that under California law Appellants acquired 12% of the oil produced from the well by a conveyance which was recorded long prior to insolvency and after the well was on production for many weeks. If the creditors saw fit to extend additional credit to the bankrupt with knowledge of this conveyance in hope and expectation of receiving additional profits from the sale of materials and labor on other enterprises of the bankrupt, certainly they should not be entitled to reach back over the months and, because their operations proved unprofitable, seek to obtain Appellants' property in payment of their claims. This reasoning is both logical and equitable and Appellants believe and urge that the authorities cited by them sustain their position.

Respectfully submitted,

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